INDEX

	Page
Petition for a Writ of Certiorari:	
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Amendment and Statutes Involved	4
Statement of the Case	4
A. The Indictment	4
B. The Evidence at Petitioner's Trial	4
C. Proceedings in the District Court	8
D. Proceedings in the Court of Appeals	8
Reasons for Granting the Writ	9
I. The Search of Petitioner's Automobile and the Consequent Seizure of the Marked Money Were Illegal	9
II. The Search of Wright's Apartment and the Seizure of the Glass Bottle Were Illegal	12
A. The Court of Appeals' Reliance on Miss Wright's "Consent" Is Contrary to the Decision of this Court	12
B. Miss Wright's Consent Was Not Voluntary	17
Conclusion	21
Appendix A: (Opinion of the Court of Appeals, Feb. 25, 1965, Judgment and Order)	1a
Appendix B: (Opinion of the Court of Appeals, May 29, 1964)	14a

Page

Appendix C: (Post-Trial Memorandum for the District Court) 36a

Appendix D: (Constitutional Amendment and Statutes Involved) 45a

TABLE OF CASES

Boyd v. United States, 116 U.S. 616 11
Carroll v. United States, 267 U.S. 132 11
Channel v. United States, 285 F. 2d 217 (CA 9) 18
Chapman v. United States, 365 U.S. 610 .....13, 14, 15
Heflin v. United States, 358 U.S. 415 2
Higgins v. United States, 209 F. 2d 819 (CADC) 18
Jones v. United States, 362 U.S. 257 .....12, 15, 16, 17
Judd v. United States, 190 F. 2d 649 (CADC) 18
Ker v. California, 374 U.S. 23 19
Linkletter v. Walker, 381 U.S. , 33 LW 4576 (June 7, 1965) 20
McAbee v. United States, 361 U.S. 537 2
McAllister v. United States, 348 U.S. 19 19
One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 12
Preston v. United States, 376 U.S. 364 .....2, 9, 11, 12
Reck v. Pate, 367 U.S. 433 20
Stoner v. California, 376 U.S. 483 .....13, 14, 15
United States v. Arrington, 215 F. 2d 630 (CA 7) 18
United States v. Jeffers, 342 U.S. 48 .....13, 14, 15
United States v. MacLeod, 207 F. 2d 853 (CA 7) 18
United States v. Page, 302 F. 2d 81 (CA 9) 17, 20
United States v. Rabinowitz, 339 U.S. 56 9
United States v. Sferas, 210 F. 2d 69 (CA 7) 15
Ziemer v. United States, 368 U.S. 877 18

CONSTITUTION, STATUTES AND RULES

U. S. Constitution:

Fourth Amendment 3, 4, 9, 13, 18

Page

STATUTES:

21 U.S.C. § 174 ..... 1, 4
28 U.S.C. § 1254(1) 2
49 U.S.C. § 781 ..... 4, 10
49 U.S.C. § 782 ..... 3, 4, 10

RULES:

Supreme Court of the United States, Rule 22(2) 2
U. S. Court of Appeals, Ninth Circuit, Rule 23(5) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

RICHARD W. BURGE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Richard W. Burge prays that a Writ of Certiorari issue to review the judgment of the U. S. Court of Appeals for the Ninth Circuit of February 25, 1965 affirming his conviction for a violation of 21 U.S.C. § 174 and a sentence of five years imprisonment

imposed by the U. S. District Court for the District of Alaska.

OPINIONS BELOW

The opinions of the Court of Appeals on rehearing are reported at 342 F. 2d 408. They are reprinted in Appendix A, pp. 1a-12a, *infra*. The opinions of the Court of Appeals on the original hearing are reported at 333 F. 2d 210. They are reprinted in Appendix B, pp. 14a-35a, *infra*. The District Court's post-trial Memorandum Opinion is unreported. It is reprinted in Appendix C, pp. 36a-44a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1965. On April 17, 1965 the Court of Appeals denied an untimely petition for rehearing in an order reprinted in Appendix A, p. 13, *infra*. On May 11, 1965 petitioner made application to Mr. Justice Douglas for an extension of time to file a Petition for Certiorari. This motion was granted on May 14, 1965 and the time for filing the petition was extended to June 16, 1965 "providing the statutory time has not already expired." While we would urge, if necessary, that the petition for rehearing, though untimely, tolled the time for filing under Rule 22(2) of this Court, it is settled that this Rule is not jurisdictional. *Heflin* v. *United States,* 358 U.S. 415, 418 n.7. See also *McAbee* v. *United States,* 361 U.S. 537 and *Preston* v. *United States,* 376 U.S. 364 which were decided on their merits though the petitions for certiorari were untimely filed. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is the legality of the search of petitioner's automobile, conducted without a warrant, seven days after his arrest and at a place remote from that of the arrest, saved by the circumstance that the automobile had been impounded for forfeiture under 49 U.S.C. § 782?

2. Petitioner was a house guest at the apartment of one Miss Wright, living in a separate bedroom, but sharing a bathroom. With Miss Wright's consent, given while she was under arrest, and found to be voluntary by the trial court, police officers searched the apartment without a warrant, and seized an item in the bathroom. The ruling of the Court of Appeals affirming the admissibility of this item over petitioner's objection raises three questions:

a) Did Miss Wright's consent support the warrantless search and seizure of evidence against petitioner?

b) Does a Court of Appeals adequately review a District Court determination that the consent to a search was "voluntary" and obviates the Fourth Amendment's requirement of a warrant, when it affirms that determination on the sole ground that it was not "clearly erroneous"?

c) May a consent to a search be considered "voluntary" and obviate the requirement of a warrant where the consenting party is under arrest? If so, what factors should the courts consider in determining voluntariness of a consent given under arrest?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, 21 U.S.C. § 174 and 49 U.S.C. § 781 and § 782. These provisions are reprinted in Appendix "D", pp. 45a-46a, *infra*.

STATEMENT OF THE CASE[1]

A. The Indictment

Petitioner Richard W. Burge was indicted on two counts charging violations of 21 U.S.C. § 174. Count one, on which the jury was unable to agree, charged that on or about the 23rd day of April 1959 at Fairbanks, Alaska he knowingly received, sold and facilitated the sale of heroin to one Hazel Geary. The second, on which petitioner was convicted, charged that on or about the same date he did knowingly conceal and facilitate the transportation of heroin.

B. The Evidence at Petitioner's Trial

As the issues on which review is sought relate exclusively to the admissibility of two pieces of evidence which were seized in separate warrantless searches, a full recitation of the evidence at petitioner's trial is not necessary. The chief prosecution witness was one Hazel Geary, of whom it would be more charitable than accurate to say that she was a gentlewoman "worthy

[1] The Record in this Court consists of formal documents in the District Court and Court of Appeals and two volumes of the Transcript of Trial Proceedings which will be cited as "Tr.".

implicit belief."[2] The Court of Appeals summarized her testimony as follows (App. A., pp. 3a-4a, *infra*):

> "That on the night of April 20, 1959, appellant approached her with a proposal to 'dump a large quantity of heroin'; that she demanded a sample before she would do business on a larger scale; that she was furnished $20 by law enforcement officers and purchased a sample of heroin from appellant on April 22, 1959; that on that day she turned over to the officers an eyedropper and a hypodermic needle which evidence a trace of narcotics (Exhibit "A" at the trial); that at noon on April 23, 1959, she was furnished $400 in marked currency by the law enforcement officers and about 2:30 o'clock of that day purchased a quantity of heroin from the appellant with that money; that after the purchase she remained with appellant until about 7:30 o'clock of that day, when appellant transported here in his car to the Idle Hour Cafe where both were arrested. She further testified that just prior to the departure for the Idle Hour Cafe appellant stated to her, 'You don't want to be out there with that stuff on you.' The heroin which Hazel Geary claimed to have purchased from appellant on that day was turned over to the officers after her arrest (Exhibit "B" at the trial)."

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[2] She was characterized as follows by the Court of Appeals (App. A., p. 4a, *infra*.):

> "While it is true that Hazel Geary admitted that she was a prostitute, a narcotics addict, had been convicted of a felony, to wit: grand theft, was a government informer on appellant and was under a pending indictment for the offense of passing travelers' checks knowing the same to have been forged, and on which charge she had not been tried at the time of appellant's trial in September of 1962, nevertheless, it is apparent from the verdict of the jury that it believed her testimony rather than the testimony of the appellant who denied all knowledge or connection with the narcotics transaction of which he was accused."

There was also testimony by law enforcement officers that they had petitioner under observation during the afternoon of April 23, but none saw petitioner in possession of any narcotics or transferring narcotics to Hazel Geary. When petitioner was arrested a search of his person and of his automobile disclosed neither narcotics nor marked currency. Petitioner testified in his own behalf and denied any possession of or any transaction in narcotics. He also presented evidence to show that he could not have placed the marked money in his automobile because it would have been found in the first search if it was there, and because he had been under arrest until after the search which did uncover the money.

The prosecution introduced into evidence two additional exhibits, the admissibility of which is the issue here. This evidence consisted of a bottle which had petitioner's fingerprint on it and contained milk sugar, a substance used to dilute heroin, (Exhibit "C")[3] and the marked currency which the government had given to Hazel Geary to purchase heroin (Exhibit "E").

The Court of Appeals described the circumstances by which the glass bottle was seized as follows (App. A. pp. 4-5, *infra*):

> "The record shows that the appellant came from Anchorage to Fairbanks, Alaska, on the 18th day of April, 1959, to engage in the cardroom business with one Arthur Bell. From his arrival until his

[3] The government also introduced an eyedropper and hypodermic needle containing traces of heroin (Exhibit "D") which had been seized in the same search which turned up the bottle. Exhibit "D" was originally admitted but was subsequently excluded because the trial judge ruled that there was insufficient proof of connection between the defendant and the exhibit.

arrest he was a guest in a two-bedroom one-bathroom dwelling house located in Fairbanks, rented and partially occupied by one Dolores Jean Wright, hereinafter called Wright; that following the arrest of appellant and Hazel Geary at the Idle Hour Cafe in the early evening of April 23, 1959, Wright was arrested, accused of illegal possession of narcotics and taken to police headquarters. Two law enforcement officers testified that following the arrest of Wright they requested her permission to search her apartment; that Wright said 'Yes,' that she had nothing to hide, although when presented a written waiver of search she refused to sign it, saying, 'You don't need that, you got my permission.' The officers further testified that, based solely on the verbal permission, a search of Wright's apartment was made. As a result of the search they obtained items consisting of a glass bottle containing material identified as milk sugar (Exhibit "C"), and an eyedropper and hypodermic needle ("Exhibit "D"), all of which items were taken from the bathroom of the apartment; that when the search was made no one was in the apartment and the searching officers were unaware that appellant was staying there as a guest."

With respect to the marked currency the Court of Appeals said (App. 6a):

"Following the arrest of appellant on the evening of April 23rd, his automobile was impounded by the arresting officers. On April 30, 1959, the officers received information from an undisclosed source that the marked money was secreted in appellant's automobile. The automobile was still impounded, and the officers searched it and found the marked currency secreted in the headlight section of the automobile. They did not obtain a search warrant and did not have the appellant's permission to make the search."

C. Proceedings in the District Court

Before trial petitioner made a motion to suppress any evidence found as a result of the search of petitioner's automobile. A pre-trial hearing was held on the motion (Tr. 4-13) and the motion was denied (Tr. 13). When the money found in the car was introduced (Ex. "E") petitioner reiterated his objection (Tr. 245). In the course of the trial, when the Government prepared to introduce Exhibits "C" and "D", which had been obtained in the search of the house, petitioner objected to their admission. After a hearing outside the presence of the jury (Tr. 86-121) to ascertain how the Government obtained possession of these items, the Court overruled the objection (Tr. 128-129) and admitted the exhibits into evidence. Subsequently, however, the Court excluded Exhibit "D" from the jury's consideration (Tr. 326-327). In its post-trial memorandum the District Court reaffirmed its ruling admitting Exhibit "C" (App. C., pp. 36a-39a). The Court's grounds for admitting Exhibit "E" are not stated anywhere in the record.

After trial the jury returned a verdict of guilty on a possession charge but was unable to agree on the charge that petitioner had sold narcotics to Hazel Geary. (See p. 54 of Volume I of the record in this Court). Petitioner moved for a judgment of acquittal and for a new trial which was denied by the District Court (id. pp. 83-84) with a memorandum opinion App. C., pp. 36a-44a, *infra*). Subsequently the District Court sentenced petitioner to five years imprisonment (Volume I of the record in this Court, p. 104).

D. Proceedings in the Court of Appeals

Petitioner appealed his conviction to the Court of Appeals, urging *inter alia,* that the District Court had erred in admitting Exhibits "C" and "E". The case

was heard before Judges Madden (of the Court of Claims, retired), Chambers and Jertberg. On the original hearing the Court of Appeals reversed petitioner's conviction. In an opinion by Judge Jertberg the Court ruled that Dolores Jean Wright's consent to the search of the apartment which petitioner shared with her was voluntary, but that it did not justify the seizure of the bottle. The Court also ruled that the warrantless search of the automobile was proper, and rejected his other contentions. (App. B, pp. 14a-30a *infra*).. Judge Madden dissented because in his view the bottle was lawfully obtained by the police. (App. B., pp. 30a-35a, *infra*.)

The United States petitioned for rehearing *en banc*. Under Rule 23(5) of the Court below, petitions for rehearing *en banc* are considered by the panel which heard the case and that panel decided to rehear the case itself. On rehearing a majority of the Court affirmed petitioner's conviction in an opinion by Judge Madden. Judge Chambers gave a brief concurring statement explaining the reasons for his change of position and Judge Jertberg filed a brief dissent reaffirming his views on the original hearing. (App. A, pp. 1a-12a, *infra*).

REASONS FOR GRANTING THE WRIT

I. THE SEARCH OF PETITIONER'S AUTOMOBILE AND THE CONSEQUENT SEIZURE OF THE MARKED MONEY WERE ILLEGAL.

The second search of petitioner's automobile, which uncovered the marked money which was government Exhibit "E" at his trial, was conducted without a search warrant, while petitioner was in custody, seven days after his arrest and at a location two removes from the place of the arrest. *Preston* v.

United States, 376 U.S. 364 squarely holds that a search and seizure so remote in time and place from the arrest cannot be justified under the "incident to an arrest" exception to the Fourth Amendment's mandate that a search warrant be obtained. In *Preston* the search occurred the same day as the arrest and at a police garage where it had been taken from a police station. See *id.* at 365. This Court unanimously held the search to be illegal: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.* at 367. This case is identical to *Preston* in all respects but one: here the time between the arrest and search was considerably longer than in *Preston.* Reversal would follow automatically, were it not for the Government's contention that the search was reasonable because the car had been impounded for forfeiture pursuant to 49 U.S.C. § 782. Discussion of this point is required because the Government's view was adopted, without elaboration, by the Court of Appeals.[4] But as we show hereinafter this issue has likewise been decided against the Government in *Preston.*

The Governments' theory is simplicity itself: 1) 49 U.S.C. § 781 forbids the use of any vehicle for the sale or possession of certain contraband articles, including illegal narcotic drugs; § 782 in turn subjects to forfeiture any vehicle which has been used in violation of § 781. 2) The Government had probable cause to be-

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[4] The discussion of this issue in the Court's opinion on rehearing repeated that of the original majority *in haec verba,* except that the later opinion omitted the following: "It is only unreasonable searches that are prohibited. *United States* v. *Rabinowitz,* 339 U.S. 56". (App. B, p. 28a, *infra.* Compare App. A, p. 11a, *infra.*)

lieve that petitioner's car was so used and impounded it. 3) Since the car was in the lawful custody of the Government it could be searched at will, free of the requirements of a search warrant.

While there are several defects in this reasoning, the decisive one is that the same argument has already been presented to and rejected by this Court. In *Preston* itself the Government argued that independent of the arrests the search and seizure of the automobile were lawful because the officers had probable cause to believe that it had been stolen.[5] In support of that proposition the Government advanced an argument, set out in full in the margin,[6] which precisely parallels its reasoning here: 1) The officers had probable cause to believe that the automobile had been stolen. 2) As stolen the automobile was subject to seizure by the Government under the common law (*Boyd* v. *United States,* 116 U.S. 616). 3) "Once the automobile was properly seized as stolen property, it could be moved, inventoried and searched." This Court's response was

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[5] Brief for the United States, No. 163, Oct. Term, 1963, pp. 36-39.

[6] "It is not necessary, however, to go so far as *Carroll* [v. *United States,* 267 U.S. 132] went in order to sustain the searches in this case. We have seen (pp. 29-34) that the officers had probable cause to believe that the automobile had been stolen. They had reasonable ground to believe that they could seize it as stolen from its proper owner; there was no need to search an automobile which was not itself contraband while looking for contraband. As this Court stated in *Boyd* v. *United States,* 116 U.S. 616, 623, "[t]he seizure of stolen goods is authorized by the common law." The reason is that the thieves have no right to such goods since "the owner from whom they were stolen is entitled to their possession * * *." *Id.* at 624. Once the automobile was properly seized as stolen property, it could be moved, inventoried, and searched." Brief for the United States, No. 163, Oct. Term, 1963 p. 39, footnote omitted.

brief but unequivocal: "Here, we may assume, as the Government urges, that, either because the arrests were valid, *or because the police had probable cause to think the car stolen,* the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place." 376 U.S. at 367-68. (Emphasis supplied). Except that the Government's claim to possession rests on a different source than in *Preston,* a difference that cannot be thought to affect the result, the *Preston* case is this case.[7] The judgment below should not be permitted to stand.

II. THE SEARCH OF WRIGHT'S APARTMENT AND THE SEIZURE OF THE GLASS BOTTLE WERE ILLEGAL

A. The Court of Appeals' Reliance on Miss Wright's "Consent" Is Contrary to the Decisions of This Court

Since the police admittedly had no warrant either to search Miss Wright's apartment or to seize the glass bottle which became Exhibit C at petitioner's trial, its admissibility depends, as all agree, on the effectiveness of Miss Wright's "consent" to the search of her apartment to validate that search and the subsequent seizure of the bottle. On the original hearing a majority of the Court below held that the bottle was inadmissible. The Court determined that petitioner had standing to object to the admission of the bottle (App. B., pp. 21a-26a, relying particularly on *Jones* v. *United States,* 362 U.S. 257) and held that Miss Wright's consent,

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[7] If anything, the Government's present case is somewhat weaker. In *Preston* the Government said: "There was no need to search an automobile which was not itself contraband while looking for contraband." See n. 6, *supra.* This step of its reasoning would seemingly be unavailable here, for the automobile is only "derivative" contraband, whereas it was contraband *per se* in *Preston.* Cf. *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693.

even if binding on her, did not make the search "reasonable" under the Fourth Amendment, and the evidence seized admissible against petitioner, her house guest. The Court pointed to *United States* v. *Jeffers*, 342 U.S. 48 and *Chapman* v. *United States*, 365 U.S. 610 and concluded that a house guest was entitled to the same protection as a hotel guest or a tenant.[8] (App. B, pp. 26-28, *infra*.)

On rehearing, the majority below reached the opposite result. Judge Madden acknowledged petitioner's standing to object (App. A, p. 10, *infra*) but held that the search and seizure were lawful. He reasoned as follows:

> "If a tenant of a two-bedroom, one-bathroom apartment rents one of her bedrooms to another person, and if the narcotics squad picks up a narcotics victim and asks him where he got the narcotics, and he says he got them in that apartment, and the officers go to the apartment and tell the tenant what they have heard and she indignantly denies the possibility of such an occurrence and the officers ask if they may look through the apartment and she says they may but they will not find anything, and they do look and they find narcotics in the bathroom, may they not seize them? Does the Constitution say that this lady may lawfully consent to the entrance into her bathroom of any person in the whole wide world except officers of the government whose duty it is to enforce that government's laws? Does it say that the officers, having entered and seen objects whose only use is to violate the laws, have somehow blundered, so that the conclusive evidence which they have thus discov-

[8] The Court could also have cited *Stoner* v. *California*, 376 U.S. 483 decided two months previously.

ered cannot thereafter be used by their government to convict the guilty person?"

> "The Constitution forbids 'unreasonable searches.' We see nothing unreasonable in the search, in the instant case, of Wright's bathroom, with her consent." (App. A, pp. 9-10, *infra.*)

We note, without stopping to consider its possible legal implications, a difference between the case hypothesized by Judge Madden (seizure of narcotics, which are contraband) and the facts here (seizure of a glass bottle containing a substance which can be used to dilute narcotics). And we acknowledge that this reasoning has a substantial surface appeal. But we submit, with all respect, that it cannot be squared with the decisions of this Court which have established the test for determining whether the consent of one person can support the admissibility of seized evidence against another. While we agree that the *Jeffers* and *Chapman* cases, *supra,* (cited in the original opinion but not discussed on rehearing) lead to the same result, we think the most important authority is *Stoner* v. *California,* 376 U.S. 463. There the Court (unanimous on this issue) held that the test was whether the consenting person was acting as the *agent* of the defendant.

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." *Id.* at 489.

By that test, Wright's consent was plainly not binding on petitioner. There is no suggestion in the record that they were partners in a narcotics enterprise, cf.

United States v. *Sferas*, 210 F. 2d 69 (CA 7), or that there is any other basis for inferring that Wright was acting in petitioner's behalf. On the contrary, it is entirely clear that Wright was acting strictly in her own behalf, to exculpate herself from the charges on which she had been arrested.[9] This is expressly stated by Judge Madden in the passage quoted above, and in two other places in his opinion (App. A, pp. 5a and 8a, *infra.*) While we do not assert that common-law rules are strictly applicable for determining agency in applying the *Stoner* test, the facts here emphatically negative an agency relationship under any plausible meaning of "agent."[10] The point which Judge Madden's analysis appears not to have taken into account—but which was the premise underlying this Court's decisions in *Jeffers, Jones, Chapman* and *Stoner*—is that the constitutional right of privacy is personal to each individual whose persons, papers and effects the Government wishes to search or seize. That is why the only consent which can sanction invasion of an individual's privacy is his own, or that of his agent. And the same point leads to an additional line of reasoning which requires disapproval of the result reached below. Even if it be assumed (for this purpose only) that the police were properly looking around the apartment in the privacy of which Wright and petitioner each had an

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[9] This fact supports, though not conclusively, the Government's position that consent was voluntary. See n. 17, *infra.*

[10] Indeed one can go one step further. Wright was acting directly counter to petitioner's interest. "It is crystal clear that the purpose of the search of the apartment was to seize incriminating evidence against the appellant." App. B, p. 21a, *infra.* This observation in the Court's original opinion was not contradicted in Judge Madden's dissent or in his subsequent opinion for the Court.

interest, it by no means follows that the police could seize any objects they found and introduce them into evidence against him. If, for example, the police had found some personal letters belonging to petitioner, would Wright's consent even arguably have authorized their seizure? Whatever its effect on the legality of the *search,* Wright's consent cannot support the *seizure* of *petitioner's* effects. This difficulty seems to have escaped attention below because of the ambiguity of petitioner's interest in the bottle. The seizure can be sustained only on the assumption that petitioner had no interest in the bottle;[11] but on that assumption it should have been excluded as irrelevant and immaterial.[12] Thus, to sustain the admissibility of Exhibit C "would be to permit the Government to have the advantage of contradictory positions as a basis for

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[11] That interest need not be a possessory interest, cf. *Jones* v. *United States,* 362 U.S. 257, 263.

[12] This inherent inconsistency is highlighted by the Court of Appeals' opinion. The bottle was thought to be of little evidentiary importance, because the petitioner "might well have picked up numerous articles in the bathroom and there left his fingerprints on them, quite innocently . . ." (App. A, p. 8a, *infra*). It is readily understandable that having started with this view, the Court failed to consider petitioner's interest in saving the bottle from seizure apart from his interest in the privacy of the apartment generally. But the very statement of the attenuated relationship between petitioner and the bottle, far from confirming admissibility, establishes that the jury should not have been allowed to consider the bottle as evidence against him. It should be noted too that the District Court assessed Exhibit C differently, for it was allowed to remain in evidence though Exhibit D (secured in the same search) was removed from the jury's consideration because it was insufficiently linked to the defendant. See App. A, p. 6a, *infra.* Indeed, the jury might have inferred significance from the very fact that it had been admitted. As the closing statements were not transcribed we do not know how much reliance the prosecution placed on this evidence before the jury.

conviction," contrary to the teachings of *Jones* v. *United States,* 362 U.S. 257, 263.

The importance of the question was well stated by the Government in its Petition for Rehearing *en banc* below.

> "The Court's previous decision is not an insignificant one which pertains only to this case. It will affect nation-wide law enforcement and is of such general importance as to merit review by the entire Court." (Id. p. 2).

A case which, in the view of the United States, "will affect nation-wide law enforcement" plainly warrants the attention of this Court.

B. Miss Wright's Consent Was Not Voluntary

In our previous discussion we have accepted the premise of the courts below that Wright's consent to the search of the apartment in which petitioner was her guest was voluntary. But that assumption itself raises two questions on which the Courts of Appeals are divided, and which are of considerable importance to the administration of criminal justice. The first, and subsidiary question is the scope of review to be applied by the Courts of Appeals in passing on a determination by the trial court that a consent to a search was voluntary. The second is whether and under what circumstances a consent by a person under arrest can be voluntary as a matter of law.

(1) In approving the trial court's determination that Wright's consent was voluntary the Court of Appeals applied the "clearly erroneous" standard which had been adopted for the Ninth Circuit in *U.S.* v. *Page,* 302 F.2d 81 (en banc). (App. A, p. 8a) This view is

contrary to that of the Seventh and District of Columbia Circuits, *United States* v. *MacLeod*, 207 F.2d 853 (CA 7); *United States* v. *Arrington*, 215 F.2d 630 (CA 7); *Judd* v. *United States*, 190 F.2d 649 (CADC); *Higgins* v. *United States*, 209 F.2d 819 (CADC). The Government, citing those cases with apparent approval, has recognized that they require a broader review than the clearly erroneous standard which the Ninth Circuit subsequently adopted.[13] The question whether a consent to a search is voluntary for the purpose of determining whether it justifies a search which would otherwise be illegal under the Fourth Amendment is obviously a question having legal, indeed, constitutional elements. Accordingly, the "clearly erroneous" standard applied below affords inadequate review. Petitioner was entitled to have at least one proper appellate review of the district court's finding of vol-

[13] Brief for the United States in Opposition, *Ziemer* v. *U.S.*, No. 227, Oct. Term, 1961, pp. 6-7. In *Ziemer* the petitioner had argued that the Courts of Appeals are split on whether the test of appellate review is that the finding of the District Court is sufficiently supported by substantial evidence or that the finding can be sustained only when the appellate court determines on independent appellate review that the evidence shows bona fide consent to the search. The Government stated that there is no difference between these two tests:

> "In each case, the appellate court defers to the district court on matters of credibility and reviews the sufficiency of the evidence in support of the determination that consent to search had been obtained. Whether the court, in reviewing the credible evidence, finds sufficient support for the consent to search is the central issue on appellate review. *Channel* [v. *United States*], 285 F. 2d [217] at 220; *Judd, supra*, 190 F. 2d at 652; *MacLeod, supra*, 207 F. 2d at 854." Id. at p. 7. Certiorari was denied in *Ziemer*. 368 U.S. 877.

In this case the Court of Appeals plainly failed to "review the sufficiency of the evidence in support of" the Trial Court's determination.

untariness.[14] Accordingly, the case should be remanded to the Court of Appeals for re-examination of the voluntariness of the consent under proper standards or the issue should be determined by this Court.[15] We submit that the latter course would be preferable for the issue of voluntariness itself warrants this Court's consideration, as we now show.

(2) This Court has not decided whether a consent to a search given by a person under arrest can ever be considered voluntary to justify a search without a warrant or, if so, how the voluntariness of a consent given under arrest is to be determined. The issue is one which recurs continually and is one on which the lower federal courts and the state courts (which will be confronted with the same issue, *Ker* v. *California,* 374 U.S. 23) should have the guidance of this Court. We think there is much to be said for a rule holding that consent to a search given under arrest is never voluntary. Coercion or moral compulsion is implicit in arrest. On the other hand, a square holding that officers cannot rely on the consent given by a person under arrest would not inhibit the operations of the police because when the person whose premises are to be searched is in custody there will rarely be any reason not to obtain a search warrant. Indeed, the police will be benefited by a flat rule because they will know that they cannot rely on the consent and will therefore not be tempted to search without a warrant

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[14] We do not challenge the appropriateness of the Court's acceptance of the trial court's evidentiary findings on this issue, i.e., its refusal to credit Miss Wright's denial that she had consented.

[15] Compare *McAllister* v. *U.S.*, 348 U.S. 19. There the Court after determining the proper scope of review of findings of a district court sitting without a jury in an admiralty case went on to apply that test itself rather than remand to the Court of Appeals.

and to take the risk that the search will subsequently be held to be illegal. Moreover, a general rule which accords with general human experience would remove from the trial courts the necessity of making difficult ex post facto judgments on the state of mind of the consenting party. Particularly if such a rule were to be applied prospectively, cf. *Linkletter* v. *Walker,* 381 U.S. , 33 LW 4576 (June 7, 1965) it would have a salutary effect on the administration of criminal justice.

It does not appear appropriate to explore in a petition for certiorari the factors which are to be considered in passing on the voluntariness of consent during arrest in the absence of a general rule vitiating such consents. To some extent of course each case would then have to depend on its own facts, and the process of decision could not depend on a "mere color matching of cases," as this Court observed in the analogous context of the voluntariness of a confession.[16] But even as, in the confession cases, this Court has delineated certain elements to be considered in determining voluntariness (e.g. the age of the party, and the circumstances of the arrest) so it should be possible to isolate the factors which strongly point to or against voluntariness. If the fact of arrest is not controlling the question is admittedly a close one in this case.[17] At bottom the question is a constitutional

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[16] *Reck* v. *Pate,* 367 U.S. 433, 442.

[17] Miss Wright's attempt to exculpate herself appears to be the strongest point in the Government's favor. But whether it is sufficient to carry the Government's burden of proof on this issue (see *U.S.* v. *Page,* 302 F. 2d 81, CA 9 and cases cited id. at 83, n. 1) is another matter. Miss Wright was arrested at night, apparently without a warrant, taken to the police station and her consent solicited by the police. Perhaps this Court will also consider relevant other factors which were not developed at the hearing.

one because it concerns the waiver of a constitutional right. The rules to determine when such a waiver is effective can be promulgated only by this Court. The question arises with such frequency that an early resolution would be of great value to the public, the police and the lower courts.

CONCLUSION

By reason of the foregoing this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18,801

RICHARD W. BURGE, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

[Feb. 25, 1965]

On Appeal from the United States District Court for the District of Alaska

Before: CHAMBERS, Circuit Judge, MADDEN, Judge of the United States Court of Claims, and JERTBERG, Circuit Judge.

MADDEN, Judge:

Following a trial to a jury, appellant was convicted on one count of a two count indictment charging violations of 21 U.S.C. § 174.[1]

The count upon which appellant was convicted (Count 2) in substance charged that on or about the 23rd day of April, 1959, at Fairbanks, Alaska, the appellant did knowingly

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[1] Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000 . . .

Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

conceal and facilitate transportation of a narcotic drug, to wit: heroin.

Count 1, on which the jury was unable to agree, in substance charged that on or about the 23rd day of April, 1959, at Fairbanks, Alaska, appellant knowingly received, sold and facilitated the sale of a narcotic drug, to wit: heroin, to Hazel Geary.

Following conviction, the appellant was committed to the custody of the Attorney General of the United States for a period of five years.

Appellant's specification of errors may be grouped as follows:

1. Errors of the District Court in refusing to suppress, and in admitting into evidence, certain proffered exhibits claimed to have been obtained in violation of the provisions of the Fourth Amendment prohibiting unreasonable search and seizure;

2. Errors of the District Court in denying appellant's motion for judgment of acquittal made at the close of the government's case and renewed at the close of all of the evidence; and

3. Errors of the District Court in the giving of certain instructions to the jury.

Before considering other specified errors, we shall first consider appellant's contention that the District Court erred in denying appellant's motion for a judgment of acquittal, under which contention we shall also consider whether the verdict of the jury is supported by substantial evidence.

The essential elements of the offense on which the jury returned its verdict of guilty are:

1. Knowingly concealing and facilitating the transportation of heroin;

2. Unlawful importation of the heroin by someone; and

3. The defendant's knowledge of such unlawful importation. See Griego v. United States, 298 F. 2d 845 (10th Cir. 1962).

Under the second paragraph of § 174, quoted supra, proof that the defendant is shown to have or have had possession of a narcotic drug shifts to him the burden of explaining such possession to the satisfaction of the jury. In the absence of such satisfactory explanation, the application of the statutory rule of evidence set forth in § 174 is deemed sufficient to authorize conviction. Yee Hem v. United States, 268 U.S. 178 (1925); Hernandez v. United States, 300 F. 2d 114 (9th Cir. 1962); Erwing v. United States, 323 F. 2d 674 (9th Cir. 1963).

Our review of the evidence convinces us that there is abundant evidence to establish the essential elements of the offense. The District Court properly denied appellant's motion and renewal thereof for judgment of acquittal. The testimony of the government's witness, Hazel Geary, standing alone, furnishes sufficient evidence to support the verdict.

Hazel Geary testified: that on the night of April 20, 1959, appellant approached her with a proposal to "dump a large quantity of heroin"; that she demanded a sample before she would do business on a larger scale; that she was furnished $20 by law enforcement officers and purchased a sample of heroin from appellant on April 22, 1959; that on that day she turned over to the officers an eyedropper and a hypodermic needle which evidence a trace of narcotics (Exhibit "A" at the trial); that at noon on April 23, 1959, she was furnished $400 in marked currency by the law enforcement officers and about 2:30 o'clock of that day purchased a quantity of heroin from the appellant with that money; that after the purchase she remained with appellant until about 7:30 o'clock of that day, when appellant trans-

ported her in his car to the Idle Hour Cafe where both were arrested. She further testified that just prior to the departure for the Idle Hour Cafe appellant stated to her, "You don't want to be out there with that stuff on you." The heroin which Hazel Geary claimed to have purchased from appellant on that day was turned over to the officers after her arrest (Exhibit "B" at the trial). A search of the person of appellant and his automobile disclosed neither narcotics nor marked currency.

On appeal following conviction, the evidence is to be viewed in the light most favorable to support the verdict. The credibility of Hazel Geary and the weight to be accorded her testimony are matters within the exclusive province of the finder of the facts. While it is true that Hazel Geary admitted that she was a prostitute, a narcotics addict, had been convicted of a felony, to wit: grand theft, was a government informer on appellant and was under a pending indictment for the offense of passing travelers' checks knowing the same to have been forged, and on which charge she had not been tried at the time of appellant's trial in September of 1962, nevertheless, it is apparent from the verdict of the jury that it believed her testimony rather than the testimony of the appellant who denied all knowledge of or connection with the narcotics transaction of which he was accused.

We will now consider the alleged errors of the District Court in refusing to suppress, and receiving in evidence proffered exhibits claimed by appellant to have been obtained in violation of his Constitutional guarantee not to be subjected to unreasonable searches and seizures.

The record shows that the appellant came from Anchorage to Fairbanks, Alaska, on the 18th day of April, 1959, to engage in the cardroom business with one Arthur Bell. From his arrival until his arrest he was a guest in a two-bedroom one-bathroom dwelling house located in Fairbanks, rented and partially occupied by one Dolores

Jean Wright, hereinafter called Wright; that following the arrest of appellant and Hazel Geary at the Idle Hour Cafe in the early evening of April 23, 1959, Wright was arrested, accused of illegal possession of narcotics and taken to police headquarters. Two law enforcement officers testified that following the arrest of Wright they requested her permission to search her apartment; that Wright said "Yes," that she had nothing to hide, although when presented a written waiver of search she refused to sign it, saying, "You don't need that, you got my permission." The officers further testified that, based solely on the verbal permission, a search of Wright's apartment was made. As a result of the search they obtained items consisting of a glass bottle containing material identified as milk sugar (Exhibit "C"), and an eyedropper and hypodermic needle (Exhibit "D"), all of which items were taken from the bathroom of the apartment; that when the search was made no one was in the apartment and the searching officers were unaware that appellant was staying there as a guest. Upon objection of the appellant to the admission of said exhibits, a hearing was held before the court in the absence of the jury. Witnesses heard at that hearing were Wright, two officers who testified they had secured verbal permission to search the premises and another officer who testified that after the search Wright was requested to sign a written consent to search but that she refused to do so. Following the hearing the two exhibits were received in evidence.

In the presence of the jury, after receipt of Exhibits "C" and "D" into evidence, there was testimony that appellant's fingerprint was found on the glass bottle (Exhibit "C"); and that the eyedropper and hypodermic needle (Exhibit "D") evidenced a trace of narcotics. Hazel Geary testified that a bottle similar to Exhibit "C" had been used by appellant in the apartment of Wright in the course of mixing the heroin which she purchased from appellant (Exhibit "B") on April 23, 1959.

Later in the proceedings, and before the case was submitted to the jury, the district judge concluded that the admission into evidence of Exhibit "D" was in error, in that the items constituting said exhibit were not sufficiently linked to the defendant. Thereupon, Exhibit "D" was stricken from the evidence and the jury was instructed to disregard the testimony relating to it.

The evidence presented by the prosecution included the $400 in marked currency which had been furnished by the law enforcement officers to Hazel Geary on April 23, 1959. Prior to the trial, appellant moved the District Court to suppress that evidence. Following the hearing on the motion and prior to trial, the District Court denied that motion. Following the arrest of appellant on the evening of April 23rd, his automobile was impounded by the arresting officers. On April 30, 1959, the officers received information from an undisclosed source that the marked money was secreted in appellant's automobile. The automobile was still impounded, and the officers searched it and found the marked currency secreted in the headlight section of the automobile. They did not obtain a search warrant and did not have the appellant's permission to make the search.

We shall first discuss the refusal of the District Court to exclude Exhibits "C" and "D."

As above stated, prior to the receipt in evidence of those exhibits, appellant moved to suppress them under the provisions of Rule 41(e), Federal Rules of Criminal Procedure. The district judge in his discretion elected to entertain the motion, although not timely made, and held a hearing in the absence of the jury. Following the hearing appellant's motion was denied and the exhibits were received in evidence over the objection of appellant. It was the view of the court that the appellant, having only

the status of a house guest in the apartment of Wright, was bound by the verbal permission granted by her to the officers to search her apartment.

While there is much discussion in the briefs relating to the degree and character of proof required on the part of the government to support the validity of the search based upon oral permission of Wright given while under arrest and in custody of her accusers, we deem it unnecessary to decide the validity of the search as it might affect her. For the purposes of our opinion, we will assume that if Wright had been a defendant in the trial under review, the verbal permission given by her to the officers to search her apartment would have precluded her from relying upon the provisions of the Fourth Amendment to exclude the exhibits. However, Wright is not named in the indictment returned against appellant and was not a party to the trial resulting in appellant's conviction.

The problem before us is whether the search is lawful as it relates to the appellant. The government makes no claim: (1) that the search was based upon a search warrant; (2) that the search was incidental to a lawful arrest; (3) that the search was made with the consent of the appellant; (4) that Wright was authorized by the appellant to consent to the search; or (5) that exceptional circumstances existed which might justify the search without a search warrant.

On the night of the search appellant was, and for several days prior thereto had been, a house guest of Dolores Jean Wright. During that period appellant occupied one of the two bedrooms in the apartment, and shared the use of the one bathroom in the apartment as well as the kitchen, living room and back porch. The appellant was under arrest and in custody at the time of the search.

Our question is whether the officers' search of the apartment, in which they found Exhibit "C", the bottle of milk sugar, and Exhibit "D," the eyedropper and hypodermic needle, was a reasonable search. They made the search with the consent of Dolores Jean Wright, the tenant of the two-bedroom apartment. There was contradictory evidence about the fact, and the voluntariness, of her consent. The trial judge found that she had consented to the search and that her consent was voluntary. We would have no possible reason to hold that that finding was clearly erroneous.

Our situation is, then, that the tenant of a small apartment is accused by the police of some violation of law with regard to narcotics. She denies the accusation. The officers ask whether they may search her apartment. She says that they may, that she has nothing to hide. They enter and search and, in the one bathroom, the only one in the apartment, they find Exhibits "C" and "D," articles frequently used in the preparation and use of narcotics. They take those articles and scientific examination of them shows a fingerprint of the defendant on Exhibit "C" and traces of heroin in the two items which are Exhibit "D."

Obviously the items of evidence here in question did not prove much, since the appellant might well have picked up numerous articles in the bathroom and there left his fingerprints on them, quite innocently, and the two items in Exhibit "D," with traces of heroin in them, could have belonged to Wright, or to other acquaintances of hers. We think the appellant's conviction, by the jury, of violation of the narcotics laws could hardly have been induced to an appreciable extent by these trifling bits of evidence. The other evidence of the prosecution was direct and cogent, and easily supported the verdict. If it were neces-

sary, we might well apply the "Harmless Error" provision of Rule 52(a) of the Federal Rules of Criminal Procedure.[2]

We shall, however, consider the problem on the assumption that the contested exhibits were of importance in the trial.

If a tenant of a two-bedroom, one-bathroom apartment rents one of her bedrooms to another person, and if the narcotics squad picks up a narcotics victim and asks him where he got the narcotics, and he says he got them in that apartment, and the officers go to the apartment and tell the tenant what they have heard and she indignantly denies the possibility of such an occurrence and the officers ask if they may look through the apartment and she says they may but they will not find anything, and they do look and they find narcotics in the bathroom, may they not seize them? Does the Constitution say that this lady may lawfully consent to the entrance into her bathroom of any person in the whole wide world except officers of the government whose duty it is to enforce that government's laws? Does it say that the officers, having entered and seen objects whose only use is to violate the laws, have somehow blundered, so that the conclusive evidence which they have thus discovered cannot thereafter be used by their government to convict the guilty person?

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[2] See People v. Parham, 60 Cal. 2d 378, holding that the "miscarriage of justice" provision of Article VI, § 4½, of the Constitution of California was applicable, and that the erroneous admission into evidence of an illegally seized object did not require a reversal, in the absence of a showing of reasonable probability that the admission affected the verdict. The decision is notable because it is a decision of the Court, in an opinion by the Justice, Mr. Justice Traynor, who wrote the opinion in the case of People v. Cahan, 44 Cal. 2d 434 (1955) excluding illegally seized evidence, six years before the Supreme Court of the United States, in Mapp v. Ohio, 367 U.S. 643, made that rule a requirement of the 14th Amendment due process.

The Constitution forbids "unreasonable searches." We see nothing unreasonable in the search, in the instant case, of Wright's bathroom, with her consent. We have no problem in this case of appellant's "standing" to object to the search and to the admission of the items seized. He did object, and we have considered his objection, but find it to be without merit. We are aware of no precedent for the proposal which the appellant urges upon us. In the case of Jones v. United States, 362 U.S. 257, no one, neither the owner nor the guest, had given consent to the entry, and the discussion was with regard to the guest's standing, to sue, with which we are not concerned, and with the manner of entry into the house with a search warrant, which the officers had in the Jones case.

The appellant urges that the marked currency, which the witness Hazel Geary testified that she had paid the appellant for heroin, which currency was found in appellant's impounded automobile and was admitted in evidence as Exhibit "E", should not have been admitted, since the search which discovered it was made without the appellant's consent and without a search warrant.

49 U.S.C. § 781 in pertinent part provides:

> (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any . . . vehicle . . . ; (2) to conceal or possess any contraband article in or upon any . . . vehicle, . . . or upon the person of anyone in or upon any . . . vehicle . . . ; or (3) to use any . . . vehicle . . . to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
>
> (b) As used in this section, the term "contraband article" means—
>
> (1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation

> of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; . . . ; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;
>
> (2) * * * *;
>
> (3) * * * *;

49 U.S.C. § 782 in pertinent part provides:

> "Any . . . vehicle . . . which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided,* * * *.

Upon the arrest of appellant, his automobile was seized by the officers and he was notified immediately that his car was being impounded "because it had been used in the sale and possession of narcotics." From the evidence which we have outlined above, it is apparent that the officers who seized the car had probable cause for believing that the car had been used in violation of the provisions of 49 U.S.C. § 781. See United States v. One 1962 Ford Victoria, 114 F. Supp. 458 (N.D. Cal. S.D. 1953). From the time of seizure until the search, the vehicle was in the lawful custody of the United States. In these circumstances the search without a warrant of appellant's car could not be said to be "unreasonable."

The appellant takes exception to several of the instructions given by the trial court, criticizing them not only as individual instructions but in combination. We have considered these criticisms and find no substantial merit in them.

The judgment of conviction is affirmed.

CHAMBERS, Circuit Judge, concurring:

I now concur on rehearing with Judge Madden in this case contrary to the position I took in concurring with Judge Jertberg when we heard the case. 333 F. 2d 210.

At that time, I thought we were bound by higher authority to hold in accordance with Judge Jertberg's views. Now I have decided that this is a case not yet reached by the Supreme Court.

It seems to me that the freely given permission of Dolores Wright, one joint but casual occupant of the bathroom, for search of the medicine chest should not offend the constitutional protections given the other joint user of the bathroom, Richard Burge. Such protection is a little too much right of privacy. Further, the evidence was simply driving a ten penny nail into a well nailed and sealed coffin.

In reversing my position, there is no way I can make myself "look good." But my commission says I was appointed during good behavior. It says nothing about being appointed to "look good."

JERTBERG, Circuit Judge: (dissenting)

Although not noted in Judge Madden's opinion, it should be stated that the decision of a majority of the panel to affirm the judgment of conviction was made on a rehearing of the cause following the decision of the panel [Judge Madden dissenting] reversing the judgment of conviction and remanding the cause to the District Court for a new trial. See *Burge* v. *United States,* 333 F. 2d 210 (9th Cir. 1964).

I dissent from the decision of the majority and I would reverse the judgment of conviction and remand the cause to the District Court for a new trial for the reasons stated in the majority opinion in *Burge* v. *United States, supra.*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18,801

RICHARD W. BURGE, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Judgment

APPEAL from the United States District Court for the District of ALASKA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ALASKA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered FEB. 25, 1965

[Caption Omitted]

Order Rejecting Suggestion of Rehearing Order Recalling and Staying Issuance of Judgment

Before: CHAMBERS, Circuit Judge, MADDEN, Judge of the United States Court of Claims, and JERTBERG, Circuit Judge.

The suggestion of appellant for a rehearing en banc is rejected. However, the certified copy of the judgment as a mandate is recalled from the district court and IT IS ORDERED that the re-issuance under Rule 26 of the certified copy of the judgment of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before May 17, 1965. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18,801

RICHARD W. BURGE, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

[May 29, 1964]

On Appeal from the United States District Court for the District of Alaska

Before: CHAMBERS, Circuit Judge, MADDEN, Judge of the United States Court of Claims, and JERTBERG, Circuit Judge.

JERTBERG, Circuit Judge:

Following a trial to a jury, appellant was convicted on one count of a two count indictment charging violations of 21 U.S.C. § 174.[1]

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[1] "Whoever fraudulently or knowlingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law * * * shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000. * * *

"Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The count upon which appellant was convicted (Count 2) in substance charged that on or about the 23rd day of April, 1959 at Fairbanks, Alaska, the appellant did knowingly conceal and facilitate transportation of a narcotic drug, to wit: heroin.

Count 1, on which the jury was unable to agree, in substance charged that on or about the 23rd day of April, 1959 at Fairbanks, Alaska, appellant knowingly received, sold and facilitated the sale of a narcotic drug to wit: heroin, to Hazel Geary.

Following conviction the appellant was committed to the custody of the Attorney General of the United States for a period of five years.

Appellant's specification of errors may be grouped as follows:

1. Errors of the District Court in refusing to suppress, and in admitting into evidence, certain proffered exhibits claimed to have been obtained in violation of the provisions of the Fourth Amendment prohibiting unreasonable search and seizure;

2. Errors of the District Court in denying appellant's motion for judgment of acquittal made at the close of the government's case and renewed at the close of all of the evidence; and

3. Errors of the District Court in the giving of certain instructions to the jury.

Before considering other specified errors, we shall first consider appellant's contention that the District Court erred in denying appellant's motion for a judgment of acquittal, under which contention we shall also consider whether the verdict of the jury is supported by substantial evidence.

The essential elements of the offense on which the jury returned its verdict of guilty are:

1. Knowingly concealing and facilitating the transportation of heroin;
2. Unlawful importation of the heroin by someone; and
3. The defendant's knowledge of such unlawful importation.

See *Griego* v. *United States,* 298 F. 2d 845 (10th Cir. 1962).

Under the second paragraph of § 174, quoted supra, proof that the defendant is shown to have or have had possession of a narcotic drug shifts to him the burden of explaining such possession to the satisfaction of the jury. In the absence of such satisfactory explanation, the application of the statutory rule of evidence or prima facie presumption set forth in § 174 shall be deemed sufficient to authorize conviction. In such circumstances the rule of evidence or prima facie presumption furnishes sufficient proof to establish the illegal importation of the narcotic drug and the defendant's knowledge that the narcotic drug was illegally imported. *Yee Hem* v. *United States,* 268 U.S. 178 (1925); *Hernandez* v. *United States,* 300 F. 2d 114 (9th Cir. 1962); *Erwing* v. *United States,* 323 F. 2d 674 (9th Cir. 1963).

Our review of the evidence convinces us that there is abundant evidence to establish the essential elements of the offense. The District Court properly denied appellant's motion and renewal thereof for judgment of acquittal. The testimony of the government's witness, Hazel Geary, standing alone, furnishes sufficient evidence to support the verdict.

Hazel Geary testified: That on the night of April 20, 1959, appellant approached her with a proposal to "dump a large quantity of heroin"; that she demanded a sample before she would do business on a larger scale; that she

was furnished $20.00 by the law enforcement officers and purchased a sample of heroin from appellant on April 22, 1959; that on that day she turned over to the officers an eyedropper and a hypodermic needle which evidenced a trace of narcotics [Exhibit "A" at the trial]; that at noon on April 23, 1959, she was furnished $400.00 in marked currency by the law enforcement officers and about 2:30 o'clock of that day purchased a quantity of heroin from the appellant for said amount; that after the purchase she remained with appellant until about 7:30 o'clock of that day when appellant transported her in his car to the Idle Hour Cafe where both were arrested. She further testified that just prior to the departure for the Idle Hour Cafe appellant stated to her, "You don't want to be out there with that stuff on you." The heroin which Hazel Geary claimed to have purchased from appellant on that day was turned over to the officers after her arrest [Exhibit "B" at the trial]. A search of the person of appellant and his automobile disclosed neither narcotics nor marked currency.

It is to be remembered that on appeal, following conviction, the evidence is to be viewed in the light most favorable to support the verdict. It is also to be remembered that the credibility of Hazel Geary and the weight to be accorded her testimony are matters within the exclusive province of the finder of the facts. While it is true that Hazel Geary admitted that she was a prostitute, a narcotic addict, had been convicted of a felony, to wit: grand theft, was a government informer on appellant and was under a pending indictment for the offense of passing travelers checks knowing the same to have been forged, and on which charge she had not been tried at the time of appellant's trial in September of 1962, nevertheless, by the implied finding of the jury it chose to believe her testimony rather than the testimony of the appellant who denied all knowledge of or connection with the narcotic traffic of which he was accused.

We will now consider the alleged errors of the District Court in refusing to suppress, and receiving in evidence, proffered exhibits claimed by appellant to have been obtained in violation of his Constitutional guarantee to be free of unreasonable search and seizure.

The record reveals that appellant came from Anchorage to Fairbanks, Alaska on the 18th day of April, 1959 to engage in the cardroom business with one Arthur Bell. From his arrival until his arrest he was a guest in a two bedroom dwelling house located in Fairbanks, rented and partially occupied by one Dolores Jean Wright; that following the arrest of appellant and Hazel Geary at the Idle Hour Cafe, in the early evening of April 23, 1959, Dolores Jean Wright was arrested, accused of illegal possession of narcotics and taken to police headquarters. Two law enforcement officers testified that following the arrest of Dolores Jean Wright they requested her permission to search her apartment; that Dolores Jean Wright said "yes" that she had nothing to hide, although when presented a written waiver of search she refused to sign it, saying, "You don't need that, you got my permission." The officers further testified that based solely on the verbal permission, a search of Dolores Jean Wright's apartment was made. As a result of the search they obtained items consisting of a glass bottle containing material identified as milk sugar [Exhibit "C"], and an eye dropper and hypodermic needle [Exhibit "D"], all of which items were taken from the bathroom of the apartment; that when the search was made no one was in the apartment and the searching officers were unaware that appellant was staying there as a guest. Upon objection of appellant to the admission of said exhibits, a hearing was held before the court in the absence of the jury. Witnesses heard at that hearing were Dolores Jean Wright, two officers who testified they had secured verbal permission to search the premises and another officer who testified that after the search Dolores Jean Wright was requested to sign a written con-

sent to search but that she refused to do so. Following the hearing the two exhibits were received into evidence.

In the presence of the jury, after receipt of Exhibits "C" and "D" into evidence, there was testimony that appellant's fingerprint was found on the glass bottle [Exhibit "C"]; and that the eyedropper and hypodermic needle [Exhibit "D"] evidenced a trace of narcotics. Hazel Geary testified that a bottle similar to Exhibit "C" had been used by appellant in the apartment of Dolores Jean Wright in the course of mixing the heroin which she purchased from appellant [Exhibit "B"] on April 23, 1959.

Later in the proceedings, and before the case was submitted to the jury, the District Judge concluded that the admission into evidence of Exhibit "D" was in error, in that the items constituting said exhibits were not sufficiently linked to the defendant. Thereupon Exhibit "D" was stricken from the evidence and the jury was instructed to disregard the testimony relating thereto.

The evidence consisted of the $400.00 in marked currency which had been furnished by the law enforcement officers to Hazel Geary on April 23, 1959. Prior to the trial appellant moved the District Court to suppress such evidence. Following the hearing on the motion and prior to trial the District Court denied the motion to suppress. It appears that following the arrest of appellant on the evening of April 23rd, the automobile of appellant was impounded by the officers. While so impounded, and on April 30, 1959, the officers received information from an undisclosed source that the marked money was secreted in appellant's car. On search of the same, without a search warrant and without appellant's permission, the officers found the marked currency secreted in the headlight of his car.

We shall first discuss the refusal of the District Court to exclude Exhibits "C" and "D".

As above stated, prior to the receipt in evidence of said exhibits, appellant moved to suppress the same for use in

evidence under the provisions of Rule 41(e), Federal Rules of Criminal Procedure. The District Judge in his discretion elected to entertain the motion, although not timely made, and held a hearing in the absence of the jury. Following the hearing appellant's motion was denied and the exhibits received in evidence over the objection of appellant. It was the view of the District Court that the appellant, having only the status of a house guest in the apartment of Dolores Jean Wright, was bound by the verbal permission granted by her to the officers to search her apartment.

While there is much discussion in the briefs relating to the degree and character of proof required on the part of the government to support the validity of the search based upon oral permission of Dolores Jean Wright given while under arrest and in custody of her accusers, we deem it unnecessary to decide the validity of the search as it might affect her. For the purposes of our opinion we will assume that if Dolores Jean Wright had been a defendant in the trial under review, the verbal permission given by her to the officers to search her apartment would have precluded her from relying upon the provisions of the Fourth Amendment to exclude the exhibits. However, Dolores Jean Wright is not named in the indictment returned against appellant and was not a party to the trial resulting in appellant's conviction.

The problem before us is whether the search is lawful as it relates to the appellant. The government makes no claim: (1) that the search was based upon a search warrant; (2) that the search was incidental to a lawful arrest; (3) that the search was made with the consent of appellant; (4) that Dolores Jean Wright was authorized to consent to the search on behalf of appellant; or (5) that exceptional circumstances existed which might justify the search without a search warrant.

The government concedes that on the night of the search appellant was, and for several days prior thereto had been,

a house guest of Dolores Jean Wright. During such period appellant occupied one of the two bedrooms in the apartment, and shared the use of the one bathroom in the apartment as well as the kitchen, living room and back porch. The appellant was under arrest and in custody at the time of the search. While the oral consent to search granted by Dolores Jean Wright was to the apartment, the record is clear that the search was directed toward the appellant who had been under almost constant surveillance of the officers for some time before the search, who were maintaining liaison with the appellant through their informant, Hazel Geary, and who were likewise stationed in the vicinity of the apartment in order to observe those leaving or entering the apartment. It is crystal clear that the primary purpose of the search of the apartment was to secure incriminating evidence against the appellant.

No reason appears in the record why a search warrant for the premises was not obtained since it appears that there was ample time and opportunity to do so. To validate the search, the government relies upon the consent given by Dolores Jean Wright while in custody under arrest on a serious charge, and without benefit of counsel.

The Fourth Amendment[2] prohibits unreasonable searches and seizures, and its protection extends to both "houses" and "effects". *United States* v. *Jeffers*, 342 U.S. 48 (1951).

In *Jones* v. *United States*, 362 U.S. 257 (1960), the Supreme Court stated at page 261:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a

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[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

> victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41 (e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' *Hatch* v. *Reardon*, 204 U.S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy."

While the District Court's refusal to suppress Exhibits "C" and "D" was not grounded upon the lack of "standing" of appellant to question the search because he did not claim any interest, possessory or otherwise, in the seized articles, the implicit basis of such refusal was on the ground that since appellant's status was only that of a house guest, he did not have a sufficient interest in the searched premises to establish him as "a person aggrieved" by the search and that the verbal consent of Dolores Jean Wright to the search was all that was required to validate the same in respect to him.

Appellee contends on this appeal that appellant (a) "lacks standing to question the search in which said exhibits were seized because he was not present at the time of the search" and "* * * was merely a house guest in the searched premises and as such was bound by the consent for a search given by the occupant of the premises, Mrs. Wright"; and (b) "because he did not allege ownership or right to possession of the items seized."

We believe that the appellee is wrong on both contentions. Exhibits "C" and "D" consisted of narcotic paraphernalia containing a trace of narcotics. Furthermore, in relation to the apartment appellant occupied the status of a house guest.

In *Jones* v. *United States, supra,* the defendant was arrested in a private apartment by federal narcotic agents who were executing a warrant to search the apartment for narcotics. The search revealed the presence of narcotics and narcotic paraphernalia. Prior to the trial the defendant moved to suppress the evidence obtained through the execution of the search warrant. The government challenged the defendant's standing to make the motion because he alleged neither ownership of the seized narcotics nor an interest in the apartment greater than that of "an invitee or guest." The hearing disclosed that the apartment belonged to a friend of the defendant; that the friend had given him a key and the right to use the apartment for which the defendant paid nothing. The defendant's home was elsewhere and he had slept in the apartment perhaps one night. The Supreme Court held:

(a) where the indictment charges possession of narcotics, the defendant is a person aggrieved by the unlawful search and seizure; and

(b) that the defendant had a sufficient interest in the premises to establish him as a person aggrieved by the search.

As to holding (a) above the court stated at page 263:

> "As to the first ground, we are persuaded by this consideration: to hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his

possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41 (e)."

As to holding (b) above the court stated at page 265:

"As a second ground sustaining 'standing' here we hold that petitioner's testimony on the motion to suppress made out a sufficient interest in the premises to establish him as a 'person aggrieved' by their search. That testimony established that at the time of the search petitioner was present in the apartment with the permission of Evans, whose apartment it was. The Government asserts that such an interest is insufficient to give standing. The Government does not contend that only ownership of the premises may confer standing. It would draw distinctions among various classes of possessors, deeming some, such as 'guests' and 'invitees' with only the 'use' of the premises, to have too 'tenuous' an interest although concededly having 'some measure of control' through their 'temporary presence,' while conceding that others, who in a 'realistic sense, have dominion of the apartment' or who are 'domiciled' there, have standing. Petitioner, it is insisted, by his own testimony falls in the former class.

"While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the Government's argument closely follows the prevailing view in the lower courts. They have denied standing to 'guests' and 'invitees' (e.g., *Gaskins* v. *United States,* 95 U.S. App. D.C. 34, 35, 218 F. 2d 47, 48; *Gibson* v. *United States,* 80 U.S. App. D.C. 81, 84, 149 F. 2d 381, 384; *In re Nassetta,* 125 F. 2d 924; *Jones* v. *United States,* 104 U.S. App. D.C. 345, 262 F. 2d 234), and employees, who though in 'control' or 'occupancy' lacked 'possession' (e.g., *Connolly* v. *Medalie,* 58 F. 2d 629, 630; *United States* v. *Conoscente,* 63 F. 2d 811). The necessary quantum of interest has been distinguished as being, variously, 'ownership in or right to possession of the premises' (e.g., *Jeffers* v. *United States,* 88 U.S. App. D.C. 58, 61, 187 F. 2d 498, 501, affirmed, *Jeffers* v. *United States,* 342 U.S. 48), the interest of a 'lessee or licensee' (*United States* v. *De Bousi,* 32 F. 2d 902), or of one with 'dominion' (*McMillan* v. *United States,* 26 F. 2d 58, 60; *Steeber* v. *United States,* 198 F. 2d 615, 617). We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31, carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer

strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."

Also see: *Henzel* v. *United States*, 296 F. 2d 650 (5th Cir. 1961). In the latter case the court stated at page 651:

> "In Jones, the Supreme Court held that a person accused of possessing narcotics in violation of the Federal Narcotics Laws could attack the Government's allegedly unlawful seizure of the narcotics even though (a) his presence in the apartment where the narcotics were seized was merely that of a 'guest' or 'invitee,' and (b) he did not admit to 'ownership' of the narcotics. In so holding, the Court repudiated the rule which had been adopted by many Courts of Appeals that, in order to qualify as 'a person aggrieved by an unlawful search and seizure,' the accused must show ownership or possession of the seized property or a substantial possessory interest in the invaded premises."

In *United States* v. *Jeffers, supra,* two aunts of the defendant in that case rented and paid for a room in a hotel. They gave the defendant a key to their room and gave him permission to use the room at will and he often entered the room for various purposes. The aunts had not given him permission to store narcotics there and they had no knowledge that there were any so stored. In the absence of the aunts and of the defendant, law enforcement officers entered the room with the permission of the assistant manager of the hotel. Without a search or an arrest warrant they unlocked the door to the room and conducted a detailed search which revealed narcotics which they seized. On the basis of the seized narcotics, defendant was convicted of violating the narcotics law. The Court of Appeals for the District of Columbia Circuit reversed the

conviction and such decision was affirmed by the Supreme Court.

In *Chapman* v. *United States,* 365 U.S. 610 (1961), acting without a warrant but with the consent of the defendant's landlord, law enforcement officers entered—through an unlocked window—and searched the defendant's rented house, in his absence, and there found and seized an unregistered "distillery" and "mash". Prior to trial defendant moved the court for an order suppressing the use of the seized items as evidence on the ground that they were obtained by an unlawful search and seizure. Such motion was denied and upon such evidence defendant was convicted. The Supreme Court held that the search was unlawful, and since evidence obtained through the search was admitted at the trial, the conviction was reversed.

In *Henzel* v. *United States, supra,* the defendant was the sole stockholder and president of a corporation. One, Cooper, recovered judgment against the corporation and obtained a general levy on the corporation's assets. Thereafter a deputy sheriff, acting under the general levy, removed most of the corporation's property to a warehouse where it was to remain pending a sale to satisfy Cooper's judgment. The deputy sheriff permitted the United States Postal Inspector to search the corporation's premises and to seize most of the corporation books and records which were in the office. The defendant was not on the premises when the search and seizure occurred. On defendant's trial for "mail fraud", the books and records so seized were received in evidence over defendant's objection following a denial of a motion to suppress. The Court of Appeals for the Fifth Circuit reversed the defendant's conviction.

While no decision of the Supreme Court of the United States has been called to our attention relating to the extent of protection afforded by the Fourth Amendment to a "house guest", we believe that such protection is no

less than that extended to a tenant of a building, to a paying guest of a hotel, or to a lodger in a rooming house, and that the consent to search given by a host of a "house guest" to those portions of the premises to which the "house guest" has access and uses with the express or implied permission of his host, is no more binding upon the "house guest" than the consent to search given by a landlord to the premises of a tenant, or the consent given by the manager of a hotel to the room of a paying guest. The single fact that rent be paid in one case and not in the other should not determine one's right to be free from unreasonable searches and seizures. Such a holding does not limit the right of a host to invite others onto the premises, including law enforcement officers, nor does it limit the right or duty of a host, with suspicion or knowledge of the presence of contraband on the premises to furnish to law enforcement officers such information which he has and which might lead to the proper issuance of an arrest or search warrant. It simply precludes the use as evidence in a criminal trial against the "house guest" of articles which have been unlawfully seized by law enforcement officers during a search directed primarily to secure incriminating evidence against the "house guest". We do not believe that in the circumstances of this case the mere verbal consent to search given by Dolores Jean Wright converts what would otherwise be an unreasonable seizure into a reasonable one. We believe that in the circumstances of this case the appellant as a "house guest" belongs to the class for whose sake the Constitutional protection is given.

We hold the District Court erred in failing to suppress Exhibits "C" and "D" and in refusing to exclude said exhibits from use in evidence. The fact that the District Court, during the course of the trial, struck Exhibit "D" from evidence and admonished the jury to disregard the same does not, in our view, cure the error. We refuse to

speculate on the extent to which the verdict of the jury was influenced by the presence of Exhibit "C" in relation to all the other evidence in the case.

Although the judgment of conviction must be reversed and the cause remanded to the District Court with instructions to grant appellant a new trial, we deem it appropriate to say that the District Court did not err in denying appellant's motion to suppress Exhibit "E", consisting of marked currency discovered in appellant's automobile by the officers, following a search without a warrant.

49 U.S.C. § 781 in pertinent part provides:

> "(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any * * *, vehicle, * * *; (2) to conceal or possess any contraband article in or upon any * * *, vehicle, * * *, or upon the person of anyone in or upon any * * *, vehicle, * * *; or (3) to use any * * *, vehicle, * * * to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
>
> "(b) As used in this section, the term 'contraband article' means—
>
> "(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; * * *; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;
>
> "(2) * * * *;
>
> "(3) * * * *."

49 U.S.C. § 782 in pertinent part provides:

> "Any * * *, vehicle * * * which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided,* * * *."

Upon the arrest of appellant his automobile was seized by the officers and he was notified immediately that his car was being impounded "because it had been used in the sale and possession of narcotics." From the evidence which we have outlined above, it is apparent that the officers who seized the car had probable cause for believing that the car had been used in violation of the provisions of 49 U.S.C. § 781. See *United States* v. *One 1952 Ford Victoria,* 114 F. Supp. (N.D. Cal. S.D. 1953). From the time of seizure until the search, the vehicle was in the lawful custody of the United States. In these circumstances the search without a warrant of appellant's car could not be said to be "unreasonable." It is only unreasonable searches that are prohibited. *United States* v. *Rabinowitz,* 339 U.S. 56 (1950).

Since the cause is to be remanded to the District Court for a new trial, we deem it unnecessary to pass upon certain jury instructions refused or given by the District Court to which appellant made timely offers and objections. Similar instructions may or may not be given or refused on the new trial.

The judgment of conviction is reversed and the cause remanded to the District Court with instructions to grant appellant a new trial.

MADDEN, Judge, Dissenting:

Our question is whether the officers' search of the apartment, in which they found Exhibit C, the bottle of milk sugar, and Exhibit D, the eyedropper and hypodermic

needle, was a reasonable search. They made the search with the consent of Dolores Jean Wright, the tenant of the two-bedroom apartment. There was contradictory evidence about the fact, and the voluntariness, of her consent. The trial judge found that she had consented to the search, and that her consent was voluntary. We would have no possible reason to hold that that finding was clearly erroneous.

Our situation is, then, that the tenant of a small apartment is accused by the police of some violation of law with regard to narcotics. She denies the accusation. The officers ask whether they may search her apartment. She says that they may, that she has nothing to hide. They enter and search, and, in the one bathroom, the only one in the apartment, they find Exhibits C and D, articles frequently used in the preparation and use of narcotics. They take those articles and scientific examination of them shows a fingerprint of the defendant on Exhibit C and traces of heroin in the two items which are Exhibit D.

This court holds that, in the defendant's trial for violation of the narcotics laws, after the prosecution had shown that the defendant, as a guest of Dolores Jean Wright, had been using her bathroom during the days preceding the search, it could not introduce in evidence the items found in the search. Obviously the items did not prove much, since the defendant might well have picked up numerous articles in the bathroom and thus left his fingerprints on them, quite innocently, and the two items in Exhibit D, with traces of heroin in them, could have belonged to Dolores Jean Wright or to other acquaintances of hers. The conviction of the defendant, by the jury, of the violation of the narcotics law must have been induced, at least in the main, by the other evidence in the case, which, as the court says, was sufficient and persuasive.

The importance to the court of the seemingly rather trifling items Exhibits C and D is that they, in the court's

opinion, inject into the case a problem of the highest importance, a problem of Constitutional law. With deference, I think they do nothing of the kind. I think the search was reasonable and lawful, though not much was found.

If a tenant of a two-bedroom, one-bathroom apartment rents one of her bedrooms to another person, and if the narcotics squad picks up a narcotics victim and asks him where he got the narcotics, and he says he got them in that apartment, and the officers go to the apartment and tell the tenant what they have heard and she indignantly denies the possibility of such an occurrence and the officers ask if they may look through the apartment and she says they may but they will not find anything, and they do look and they find narcotics in the bathroom, may they not seize them? Does the Constitution say that this lady may lawfully consent to the entrance into her bathroom of any person in the whole wide world except officers of the Government whose duty it is to enforce that Government's laws? Does it say that the officers, having entered and seen objects whose only use is to violate the laws, have somehow blundered, so that the conclusive evidence which they have thus discovered cannot thereafter be used by their Government to convict the guilty person?

In the situation just recited, should the officers, in order to be faithful to the Constitution, have had to ask the landlady if she had a guest or a lodger, because if she did they must not enter until they have hunted up the guest or lodger and obtained his consent? And if they had told the landlady that, would not her sensible reply have been, "If it is suspected that I have a lodger or a guest who is using my hospitality as a base for dealing in narcotics, I am insisting that you come in immediately and search at least the parts of my premises which both I and my guest or lodger use"?

Who could say that the lady's expression was merely a throw-back to some anachronistic conception of real prop-

erty law derived from some social situation of the Middle Ages now discoverable only by historical research? I would say that her expression made just as good sense and good law in 1964 as it would have made in 1564. If one, by inviting a guest or taking a lodger in his spare bedroom, so ceases to be the master of his own front hall or bathroom that he cannot police them or invite his Government to police them against their use as depositories of narcotics, his status has been degraded. I think the Constitution is degraded by attributing to it such an effect.

The court relies heavily upon the opinion of the Supreme Court of the United States in the case of Jones v. United States, 362 U.S. 257. In that case the United States District Court, and the Court of Appeals, had held that the defendant, because he denied that the seized narcotics were owned or possessed by him, and because he was only a guest in the house where they were seized, had no *standing* to object to their admission in evidence. In the Supreme Court, the Government sought to sustain the position of the lower courts on these points. On the first point, that the defendant's denial of an interest in the seized narcotics left him without standing to complain of their seizure, the court, of course, held that since the defendant and the Government each were impaled on the horns of a dilemma in such situations, the defendant should be the one who could escape the dilemma without damage. In the instant case the Government does not urge that the defendant lacks standing on that ground, and if it did urge it, we would reject the contention.

As to the guest status of the defendant as a ground for lack of standing, the Government does present that argument in this case. The District Court did not hold that the defendant lacked standing to raise the question of unreasonable search of the Wright apartment. It gave full consideration to the defendant's objection to the items discovered in the search. It conducted, in the absence of the

jury, a hearing regarding the circumstances of the search, taking the testimony of Dolores Jean Wright and of the police officers. In the court's denial of the defendant's motion for judgment of acquittal notwithstanding the verdict, or, in the alternative, for a new trial, the court made careful findings as to the circumstances of the search, and held that Wright had voluntarily consented to the search and that no error had been committed in admitting Exhibit C, which had the defendant's fingerprint on it. It will be remembered that the court had, at the trial, reconsidered its admission of Exhibit D, and had excluded it, apparently on the ground of relevancy, since those items did not have fingerprints or other indicia of ownership or use by the defendant. The court had admonished the jury not to consider Exhibit D in its deliberations.

The question which the District Court had to answer and the question which faces this court is the naked question of whether or not the search by the narcotics officers of the bathroom in the Wright apartment was, in the circumstances, an "unreasonable search." That is what the Constitution forbids, and that is all that the Constitution forbids. The Constitution says nothing about joint tenants, lodgers, paying guests, non-paying guests. The status of such persons may, along with the other circumstances, have a bearing upon the question whether the search was unreasonable.

The crucial circumstance in the Jones case which distinguishes it from our case is that in the Jones case the tenant of the apartment, Evans, had not consented to the entry and search. In fact, in the Jones case, the entry was with a search warrant, which the court held to have been validly issued. It also held that the search, after entry, was properly conducted. The court remanded the case to the District Court solely for the purpose of having that court pass upon the question whether the manner of entry into the house complied with 18 U.S.C. § 3109. The

Jones case did not involve the question with which this opinion is concerned.

The fact that the entry and search, in the instant case, were made with the consent of Dolores Jean Wright, the tenant of the premises, is to me conclusive on the question of the reasonableness of the search. When the time comes that my guest, whether he has accompanied me to my front door to answer the bell or is lodged in the jailhouse for the time being, may forbid the entry into my house of any person to whose entry I choose to give my consent, I don't want to be charged with having had a part in making that law and of having laid the blame for it upon the Constitution. The instant decision goes beyond any precedent, and I must dissent from it.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT FAIRBANKS

No. F-23-60 Cr.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RICHARD W. BURGE, *Defendant*.

Memorandum Opinion

An indictment returned against defendant on November 4, 1960, charged in Count I that defendant on April 23, 1959, did knowingly receive, sell and facilitate the sale of a narcotic drug in violation of 21 U.S.C.A. 174 and in Count II that defendant knowingly concealed and facilitated the transportation of a narcotic drug in violation of the same section.

By a jury verdict returned on September 29, 1962, the jury stated that they could not agree as to the crime charged in Count I of the indictment and found defendant guilty of the crime charged in Count II thereof.

On October 4, 1962, defendant moved for judgment of acquittal notwithstanding verdict, or in the alternative for new trial. Defendant's motion sets forth twenty claimed errors on the part of the court, but in the brief in support of the motion these grounds are grouped under four main points. These four points will be covered in this memorandum opinion in the order that they appear in defendant's brief.

I.

THE COURT ERRED IN ADMITTING ANY EVIDENCE OBTAINED BY SEARCH AT 774 17TH STREET; NO "CONSENT" TO THE SEARCH WAS GIVEN.

On April 23, 1959, and perhaps for a day or two prior thereto, defendant had occupied a front bedroom at the

home of Dolores Jean Wright. This house was located at 774 17th Street in Fairbanks, Alaska. It was under the control and possession of Dolores Jean Wright and defendant, with her permission, occupied this room temporarily as a house guest.

On the evening of April 23, 1959, after the arrest of Dolores Jean Wright and the defendant, and while beth of them were still in custody, a search of the premises without a warrant was made and Exhibit C, a white powder bottle, and Exhibit D, an eye dropper and hypodermic syringe, were removed from the bathroom. A fingerprint of the defendant was found on Exhibit C. Exhibits C and D were admitted in evidence but Exhibit D was later excluded by the court.

The government contends that the search was consented to by Dolores Jean Wright while defendant claims that the search was illegal and a motion to suppress Exhibits C and D was made. A hearing was held out of the presence of the jury on defendant's motion. At this hearing Dolores Jean Wright and Police Officers Barkley, McQueen, McRoberts and Calhoon testified.

In evaluating the testimony of the respective witnesses the court carefully examined the testimony given, the circumstances under which each witness testified, and every matter in evidence which tended to indicate whether the witnesses were worthy of belief. The court considered each witness's intelligence, motive, appearance, demeanor and manner while on the stand. The court further considered the relationship which each witness bore to the respective sides of the case and the extent to which each witness was either supported or contradicted by other evidence.

Dolores Jean Wright testified in substance that she didn't know of the search of her house until after it occurred; that the next day she jokingly gave the police officers verbal permission to search her house; that she absolutely did not give the police officers verbal permission to search her

house on April 23, 1959; that she didn't recall giving the police officers verbal permission to search her house on April 23, 1959; and that she had received an anonymous telephone call prior to her arrest and was advised that the police were in her house so they didn't need her permission to search since they had already done so.

After considering the testimony given by Dolores Jean Wright in accordance with the standards enumerated above the court finds that her testimony is not worthy of belief.

From the credible evidence the court finds that:

(1) On April 23, 1959, Dolores Jean Wright was arrested at a beauty parlor located at 1614 Gillam Way in Fairbanks. That no fire arms were displayed nor was Dolores Jean Wright handcuffed at the time of her arrest or at any subsequent time during the course of her detention. She was taken to the Federal Jail in the Post Office Building in Fairbanks. At approximately 9:45 p.m. she was interviewed in the interrogation room in the office of the United States Marshal in the presence of Officers McRoberts and McQueen, and George Yeager, U. S. Attorney. That Dolores Jean Wright was specifically asked for permission to search her home at 774 17th Street and verbal permission or consent to search the premises without a warrant was given by her freely, intelligently, unequivocally and specifically. This verbal permission or consent was given at approximately 10:03 p.m. and was relayed to police officers who had been guarding the premises to see that no one entered or left, at approximately 10:05 p.m.

(2) A search of the premises was commenced at approximately 10:05 p.m. No other search of the premises had been made by the police officers prior to that time. During the course of this search Exhibits C and D were removed from the bathroom located in said premises.

(3) Shortly thereafter United States Attorney George Yeager told the police officers that he felt that Dolores Jean

Wright might have a lapse of memory at a later date and suggested that it would be better if they could obtain a signed waiver of search from her. Dolores Jean Wright was again interviewed at approximately 11:00 p.m. on April 23, 1959, and was requested to sign a written waiver of search. She refused to sign the waiver, stating that the officers didn't need it since they already had her verbal permission.

(4) There is no suggestion from the testimony of Dolores Jean Wright or otherwise that the verbal consent given by her was induced or prompted by any duress or coercion, actual or implied, real or imaginary.

The search of the premises at 774 17th was consented to and defendant's motion to suppress was properly denied. *Stein* v. *U. S.*, 166 F.2d 851 (9th Cir. 1948); *U. S.* v. *Sferas*, 210 F.2d 69 (7th Cir. 1954).

II.

THE INSTRUCTION GIVEN ON CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT. PROPER INSTRUCTIONS ON THIS QUESTION WERE SUBMITTED AND REJECTED BY THE COURT.

In substance defendant contends that the court erred in refusing his offered instructions to the effect that the jury may not convict on circumstantial evidence unless the proved circumstances are not only consistent with the hypothesis of guilt, but are irreconcilable with any other rational conclusion.

The instructions proposed by defendant are not in accord with the currently-accepted rule in the federal courts. *Holland* v. *U. S.*, 348 U.S. 121; *Bolen* v. *U. S.*, 303 F.2d 870 (9th Cir. 1962); *Urban* v. *U. S.*, 237 F.2d 379 (9th Cir. 1956); *U. S.* v. *Sawyer*, 294 F.2d 24 (4th Cir. 1961); *Milanovich* v. *U. S.*, 275 F.2d 716 (4th Cir. 1960); *Ruffin* v. *U. S.*, 269 F.2d 544 (D.C. Cir. 1959).

The rule followed in the federal courts is correctly set forth in *Urban* v. *U. S.*, supra, at page 380, in the following language:

> "Under his point (3) counsel urges that the court in its charge defining direct and circumstantial evidence erred in failing to advise the jury, as requested, that circumstantial evidence must be consistent with guilt and inconsistent with any other reasonable hypothesis. We think a sufficient answer to the argument is the observation of the Supreme Court in the recent case of Holland v. United States, 348 U.S. 121, 139-140, 75 S.Ct. 127, 137, 99 L.Ed. 150, in which the court considered the same contention, saying that 'the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect'."

In the present case the court's instruction on reasonable doubt was full and adequate and the instructions given were correct.

III.

CERTAIN INSTRUCTIONS OF THE COURT GIVEN TO THE JURY WERE UNNECESSARY AND TENDED TO CONFUSE THE JURY; ONE OF THE INSTRUCTIONS WAS IMPROPER AND SHOULD NOT HAVE BEEN GIVEN.

The court's instruction No. 9 was taken verbatim from Instruction 24.07, page 167, Jury Instructions and Forms, 27 F.R.D. 39, 167. There is an abundance of evidence in the record that narcotics, and milk sugar in unstamped, unlabeled and plain white jars were handled by the defendant and that narcotics were placed in other containers that were unstamped and unmarked. Specifically, there was testimony that defendant removed narcotics from the unlabeled and unstamped white jars and placed a quantity of narcotics in an unstamped and unlabeled rubber prophylactic which was sold to Hazel Geary. Hazel Geary dropped the narcotics in the unlabeled and unstamped rubber prophylactic in her brassiere and thereafter the defendant

transported Hazel Geary and the narcotics in the unstamped and unlabeled rubber prophylactic to a cafe where they were both arrested a short time later after Hazel Geary had telephoned the police. From this and from other evidence in the record this instruction was necessary and properly given.

Instruction No. 10 was taken verbatim from Instruction 24.09, Jury Instructions and Forms, 27 F.R.D. 39, page 169. There was substantial evidence from which the jury could have found that the defendant had constructive or joint possession of the narcotics here in question. Defendant's counsel cleverly and very ably pointed the finger of suspicion at everyone other than the defendant. The finger of suspicion was pointed at cab drivers and delivery boys, known and unknown, Dolores Jean Wright, Jackie Bell and others, with particular emphasis on Jackie Bell, a known drug peddler who was a neighbor, close friend and business associate of the defendant. The evidence reflected that the said Jackie Bell and defendant were in the process of opening a card room on South Cushman Street in Fairbanks. The evidence also reflects that during the course of the day on April 23, 1959, Jackie Bell, an admittedly known drug peddler, was in and out of the premises at 774 17th on one or more occasions, that he was in the company of the defendant both at the premises and on a trip to the A.C.S. office. On cross examination and in argument, defendant's counsel very forcefully emphasized that Jackie Bell had an equal or better opportunity to have sold the narcotics to Hazel Geary and to have received the $400.00 from her than did the defendant, and to have secretly cached the same in the small opening behind the parking light in the defendant's automobile.

Under the evidence in the case and particularly due to one of the theories advanced by defendant's counsel, Instruction No. 10 was both proper and necessary.

Instructions 12 and 13 were taken verbatim from Instructions 4.01, 4.02, 4.03 and 4.06, Jury Instructions and Forms,

27 F.R.D. 39, pp. 75-79. If defendant's contention that specific intent is not an essential element of the crime is conceded, it is difficult to understand how the defendant can maintain that he was prejudiced by the giving of these instructions. The error, if any, in giving these instructions would inure to the benefit of the defendant inasmuch as they placed upon the government the additional burden of proving specific intent.

Prior to verdict defendant acknowledged that these instructions were not wrong or erroneous:

> "Mr. Kay: I will be very brief, I think instructions 9, 10, 12 and 13 are just unnecessary, because there wasn't really any issue as to intent or the other matters covered by constructive or joint possession, and it is my thinking that these instructions, *while not wrong or erroneous,* may have a tendency, because they are unnecessary, might have a tendency to mislead the jury." (Emphasis supplied.)

Rule 3, Federal Rules of Criminal Procedure, provides in part as follows:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Instruction No. 21 was adopted from *Stapleton* v. *U. S.*, 260 F.2d 415, 420 (9th Cir. 1958), in which the United States Court of Appeals for the Ninth Circuit approved the following instruction when considered with other instructions given in the case:

> "The law makes the defendant in a criminal action a competent witness: In determining his credibility, you have a right to take into consideration the fact that he is the defendant and is interested in the outcome of this trial. This interest is of a character possessed by no other witness and is therefore a matter which may seriously affect the weight and credit to be given his

testimony, and one which should be seriously considered by you in determining what weight you will give his testimony considered in connection with all the other evidence."

See also *Reagan* v. *U. S.*, 157 U.S. 301, 310; *Papadakis* v. *U. S.*, 208 F.2d 945, 954 (9th Cir. 1954); *Frederick* v. *U. S.*, 163 F.2d 536, 550 (9th Cir. 1947); *Schulze* v. *U. S.*, 259 Fed. 189 (9th Cir. 1919).

Included in the court's instructions in the present case were the following:

"It is impossible to cover the entire case with a single instruction, and, therefore, you are not to single out one instruction alone as stating the law but must consider the instructions as a whole."

"All evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should be considered with caution and weighed with great care."

Instruction 21 when considered with the instructions as a whole was proper.

IV.

The Court Should Have Granted the Defendant's Motion for Judgment of Acquittal, Renewed at the Close of All the Evidence.

There is substantial and ample evidence in the record to support the verdict finding the defendant guilty of knowingly concealing and facilitating the transportation of a narcotic drug in violation of 21 U.S.C.A. 174.

The fact that the jury was unable to arrive at a verdict as to the crime charged in Count I of the indictment is not inconsistent with the verdict returned nor is it in conflict therewith.

To sustain the verdict on Count II of the indictment it is not necessary for the court to indulge in speculation as to why the jury was unable to agree to a verdict on Count I.

The court's remarks with reference to Instruction No. 10 at pages 8 and 9 under point III hereof are reiterated. As previously pointed out by the court, counsel for defendant on cross examination and in his argument to the jury asserted the innocence of the defendant and stressed the fact that Dolores Jean Wright, Jackie Bell, an unknown cab driver or others, had an equal or better opportunity to have sold the narcotics to Hazel Geary than did the defendant.

Inasmuch as these theories were advanced and the jurors were urged to accept them, it is logical to infer that one or perhaps more of the jurors may have done so and concluded that Jackie Bell made the actual sale to Hazel Geary, received the $400.00 from her, removed the heroin from the premises and placed the $400.00 behind the parking light of defendant's car. However, this would not be inconsistent with the unanimous verdict finding that defendant knowingly concealed and facilitated the transportation of narcotic drugs.

Defendant's motions are denied.

Signed at Fairbanks, Alaska, this 30th day of January, 1963.

RAYMOND E. PLUMMER
United States District Judge

APPENDIX D

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

United States Constitution:

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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21 U.S.C. § 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than nor more than twenty years and, in addition, may be fined not more than $20,000."

49 U.S.C. § 781:

"(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term "contraband articles" means—

(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws

or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the District of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations; * * * "

49 U.S.C. § 782:

"Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: * * * "

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 262

RICHARD W. BURGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The court of appeals entered a judgment affirming petitioner's conviction on February 25, 1965. Although petitioner's motion for rehearing was filed out of time, the court treated it as a "suggestion for rehearing" and overruled it on April 17, 1965. In so doing, the court recalled its previously issued mandate and directed that it not be reissued pending the filing and disposition of a petition for certiorari "providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before May

17, 1965" (Pet. 13a). On May 11, 1965, petitioner applied to this Court for an extension of the time in which to file a petition for certiorari stating that, by the order of the court of appeals, "the petition for certiorari is due in this Court on May 17, 1965, and the stay of the mandate granted by that court is conditioned on the petition being filed on that day" (Pet. for Ext. 1). In response thereto, Mr. Justice Douglas, on May 14, extended the time for filing to June 16, 1965, "provided that the statutory time has not already expired." The petition was filed on June 16, 1965. In view of petitioner's failure either to file his petition within thirty days of the entry of judgment or to comply with the condition specified by the court of appeals, which was recognized by this Court's order of extension, it is questionable whether the petition is timely.

In any event, further review of this case is not warranted. Petitioner was convicted, after a jury trial in the United States District Court for the District of Alaska, of concealing and facilitating the transportation of heroin, in violation of 21 U.S.C. 174, and was sentenced to five years' imprisonment (R. 1, 54, 104).[1] The court of appeals first reversed petitioner's conviction, 333 F. 2d 210, but, on rehearing, the conviction was affirmed, 342 F. 2d 408 (Pet. 1a-35a).[2] Petition-

[1] "R." refers to volume one of the record filed with the petition. "Tr." refers to the transcript of the trial proceedings, filed with the petition as volumes two and three.

[2] The panel was composed of Circuit Judges Chambers and Jertberg and Judge Madden of the Court of Claims. In both decisions, all three judges were agreed that the search of

er attacks the validity of two searches: (1) of his automobile, which at the time was in the lawful custody of the Treasury Department after forfeiture under 49 U.S.C. 782, and (2) of the one bathroom in the residence of Miss Dolores Wright, with Miss Wright's consent but without the consent of petitioner, who, unknown to the searching officers, was Miss Wright's house guest at the time.

1. The evidence showed that on April 23, 1959, petitioner sold heroin to a government informant at 774 17th Street, Fairbanks, Alaska, and received in payment $400 in marked bills (Tr. 24-29, 134, 228). Petitioner then used his car to drive the informant, who still possessed the heroin, to a bar, where they were both arrested. After a search at the time of arrest, in which no marked bills were found (Tr. 32, 198-201, 219-220, 204), petitioner's automobile was impounded at police headquarters (Tr. 7). At the behest of a Treasury agent, the car was later moved to a storage yard where it was searched by the agent and State officers on April 30. In a hole in the right front fender, they found the $400 in marked bills previously furnished to the informant (Tr. 222, 228, 234-236). Petitioner's automobile was subsequently sold at auction, under 49 U.S.C. 782 [3] (Tr. 305).

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petitioner's automobile was legal. They differed over the search of Miss Wright's apartment. Judge Chambers originally concurred with Judge Jertberg in reversing the conviction, but on rehearing he agreed with Judge Madden that the conviction should be affirmed. He stated that his previous view was based on a misconception of this Court's precedents (Pet. 12a).

[3] "Any * * * vehicle * * * which has been or is being used in violation of any provision of section 781 of this title, or in,

Although the petition attacks the validity of the search of petitioner's automobile on April 30, this point was not preserved for review in the district court. Petitioner's pre-trial motion to suppress the marked bills was premised on an allegedly unlawful search of his car at a service station on the afternoon of April 23. As no evidence to support this allegation was brought forth during the hearing, the motion to suppress was denied (Tr. 13). During the trial there was evidence that petitioner's car was at the service station in question on that afternoon (Tr. 207, 278), but there was no evidence that any search was made at that time and place. Although petitioner's counsel first stated that he had no objection to the admission of the marked bills (Tr. 237), he later announced that he wished to rely on the same objection made in his pre-trial motion to suppress (Tr. 245). At no time during the trial did petitioner contend that the search made on April 30 was invalid.[4]

Even if the point had been preserved, petitioner's contention is without merit. The vehicle in question was forfeited by petitioner at the time of its use to transport illegal narcotics. *United States* v. *One 1951 Oldsmobile Sedan*, 129 F. Supp. 321 (E.D. Pa.).

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upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited * * *." There is no dispute that petitioner's car was used in violation of 49 U.S.C. 781.

[4] See the district court's Memorandum Opinion (Pet. 36a-44a), reviewing the twenty claimed errors put forth in petitioner's motion for acquittal or new trial. The point attempted to be raised here is conspicuously absent.

It was in the lawful custody of the United States at the time the marked bills were found (Pet. 10a-11a, 29a-30a). Under such circumstances, the admission of the bills into evidence was not erroneous. *United States* v. *Haith*, 297 F. 2d 65 (C.A. 4), certiorari denied, 369 U.S. 804.[5] Furthermore, the marked money was pertinent only to the charge of selling narcotics, of which petitioner was acquitted. Its admission, even if improper, obviously was not prejudicial.

2. The government's evidence relating to petitioner's second contention showed that Miss Dolores Wright, tenant of the premises at 774 17th Street, was suspected of complicity in the narcotics sale that took place there. She was arrested in the early evening of April 23, 1959, shortly after petitioner's arrest, and was interrogated at the federal building, beginning at about 9:45 p.m. (Tr. 88, 94, 102-104, 109-110). At about 10:00 p.m., she told the officers that they could search her house and take anything they wanted as she had nothing to hide (Tr. 90, 108, 113, 115). Upon searching the premises, the officers found

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[5] Nothing in *Preston* v. *United States*, 376 U.S. 364, relied on by petitioner (Pet. 9-12), requires a different result. The car searched in that case was not stolen, but belonged to one of the suspects. 376 U.S. at 365. Although the Court assumed that the police were justified in searching the car at the time they found it because they had probable cause to believe it stolen, a subsequent search without a warrant was not sustained where the car was not in fact stolen and was, at the time of the search, both presumptively and actually the property of the suspect. Here the car was definitely known to have carried illegal narcotics and was forfeited by petitioner prior to the search.

a glass bottle containing milk sugar, an item frequently used in the preparation of narcotics, which was later found to contain petitioner's fingerprint and which was introduced into evidence at his trial (Tr. 86-92, 180). Although the officers were not aware of it at the time of the search (Tr. 91, 113), petitioner was then Miss Wright's house guest, occupying one of the two bedrooms in her house and sharing with her the use of the other rooms, including the one bathroom (Tr. 97-98). The officers found the bottle of milk sugar at issue in the bathroom medicine cabinet.

The district court held the bottle admissible on the ground that Miss Wright had freely consented to the search of her residence (Tr. 128). It was then suggested by petitioner's counsel that a portion of the premises might be considered as under petitioner's control, but it was not indicated that the bathroom should be so considered (Tr. 129).

The opinion of Judge Jertberg, concurred in originally by Judge Chambers, was that the case was governed by *Jones* v. *United States*, 362 U.S. 257, which did not involve the question of the reasonableness of a search, but only that of standing. Petitioner abandons Judge Jertberg's approach and relies on *Stoner* v. *California*, 376 U.S. 483, in which a hotel clerk had permitted police to search a tenant's room. In neither case did the tenant of the premises consent to the search. The rule is settled that where, as here, persons share the right to the possession of premises, the consent of one is sufficient to authorize a valid search, resulting in evidence admissible against the other. *United States* v. *Sferas*, 210 F. 2d 69 (C.A.

7), certiorari denied, *sub nom. Skally et al.* v. *United States*, 347 U.S. 935; *Stein* v. *United States*, 166 F. 2d 851 (C.A. 9), certiorari denied, 334 U.S. 844. Petitioner's rights to the premises, whatever they may have been, were certainly not exclusive as to the place where the bottle was discovered. It was entirely reasonable for the officers, having received Miss Wright's consent, to search the only bathroom in the house and there seize a bottle which may well have belonged to her.

Petitioner argues that the bottle could not have been relevant evidence unless shown to have been his exclusive property, in which case only he could consent to its seizure. This is not so. Regardless of who owned the bottle, it was relevant evidence because it was found in the house where other evidence showed petitioner had sold narcotics to the informant and because it bore petitioner's fingerprint. That it was not his exclusive property goes only to the weight of the evidence.

There is no merit in the suggestion that Miss Wright could not properly consent to the search of her residence. Contrary to petitioner's understanding (Pet. 19), this Court has held that consent to a search may be given by a person under arrest. *United States* v. *Mitchell*, 322 U.S. 65, 69-70.

The further contention that the court of appeals applied an improper standard in weighing the testimony as to Miss Wright's consent is also without merit. By any standard, there was ample support for the district court's finding that Miss Wright had voluntarily consented to the search. The witnesses'

credibility was determinative of this issue,[6] and appellate review of findings as to credibility is necessarily restricted. The standard applied in the court below was the same used in every other circuit. We note that petitioner does "not challenge the appropriateness of the Court's acceptance of the trial court's evidentiary findings on this issue, i.e., its refusal to credit Miss Wright's denial that she had consented" (Pet. 19, n. 14). In light of this concession, little remains of his argument on this point.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JULY 1965.

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[6] Miss Wright's testimony that she did not consent until after the search was made followed rather persistent leading questioning by petitioner's counsel (Tr. 95, 98-99). On the whole, her testimony on this point was equivocal (Tr. 95-100).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 262

RICHARD W. BURGE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. The Marked Money Was Inadmissible

In response to the petition's claim that the marked money was inadmissible because the search of the petitioner's automobile a week after his arrest was illegal, the Government advances three arguments, of which only one is addressed to the merits. It relegates the controlling precedent, *Preston* v. *United States*, 376 U.S. 364 to a footnote and attempts to distinguish *Preston* on the ground that the automobile in that case turned out not to have been stolen. There is not the slightest suggestion in this Court's opinion that this circumstance, mentioned parenthetically in the

narration of facts (id. at 365) affected the reasoning or result (id. at pp. 367-8). Nor does the Government here vouchsafe any explanation of its relevance. We understand *Preston* to have held that the search of an automobile long after and far from an arrest is not incident to that arrest and is therefore not within the exception to the Fourth Amendment's requirement of a warrant for a search. The Court held in *Carroll* v. *United States,* 267 U.S. 132 that an automobile may be searched without a warrant under circumstances in which a house might not be because the automobile is readily moveable. When the automobile is in the custody of the police, however, there is no possible excuse for the failure to obtain a warrant. The suggestion in the Memorandum in Opposition that the search in this case can be justified on the ground that "the car was definitely known to have carried illegal narcotics and was forfeited by petitioner prior to the search" misses the whole point of the Fourth Amendment, which is that such judgments are to be made not by the police but by an impartial judicial officer. *Johnson* v. *United States,* 333 U.S. 10, 14; *United States* v. *Jeffers,* 342 U.S. 48-51; *United States* v. *Ventresca,* 380 U.S 102, 106-7.[1]

The government cites one District Court case, which stands for the proposition, not challenged in the petition, that 49 U.S.C. § 782 authorizes the forfeiture of

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[1] The claim that the police had "definite knowledge" (Opp. p. 5, n. 5) is not only irrelevant, it is inaccurate. The question whether the automobile had been used for carrying narcotics depended upon whether petitioner had sold the narcotics to the government informant. That issue in turn was raised by the second count of the indictment which after trial resulted in a divided jury. This confirms the premise of the Fourth Amendment that an impartial trier of fact will often disbelieve what the police "definitely know."

a vehicle which "facilitates" the illegal transportation of narcotics.[2] The only other authority cited, *U.S.* v. *Haith,* 297 F. 2d 65 (CA 4) *cert. denied,* 369 U.S. 804, is in accord with the decision below.[3] However neither the decision below, nor that in *Haith,* nor the Memorandum in Opposition attempt to resolve the paradox which underlies the Government's theory: when the Fourth Amendment prohibits unreasonable seizures as well as unreasonable searches without a warrant, how may the police seize without a warrant that which they could not constitutionally search, and then justify the search on the basis of that seizure? The theory rests at bottom on the claim that 49 U.S.C. § 782 supersedes the Fourth Amendment.[4]

The technical points raised in the petition are likewise unsound. It is first asserted that the petitioner

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[2] We reserve the right to argue if the case is here on the merits that 49 U.S.C. § 782 can be constitutionally applied to justify a seizure without a warrant only if the vehicle in question is seized at the time of the arrest, and also further that the constitutionality of the forfeiture is premised on the owner's opportunity for a hearing before it becomes final.

[3] In *Haith,* however, there was probable cause for the search, which was therefore lawful under *Carroll, supra,* as the Court of Appeals held. The Court was therefore not confronted with the question of whether 49 U.S.C. § 782 would authorize a search which would otherwise be forbidden by the Fourth Amendment, nor was that question raised in the petition for certiorari.

[4] It should be noted that 49 U.S.C. § 782 does not even purport to authorize the search here. There is nothing in its language which authorizes the government to search vehicles which are subject to forfeiture and the legislative history makes clear that this was not one of the purposes of the provision. Those purposes were to decrease the profits of narcotics violators, deprive them of vehicles which were "peculiarly adapted to" narcotics violations "and to make them available, without expense to the Government for use in the apprehension of law violators". H. Rep. No. 1034, 76th Cong., 1st Sess.

did not properly preserve the issue of the validity of the search of his automobile. (Opp. pp. 2-3). This argument is based on the fact that the motion to suppress assumed that the search had been made on April 23, rather than on April 30 as appeared at the trial. However, the precise legal issue is whether petitioner was convicted on the basis of evidence which had been illegally seized by the Government. He properly raised this issue by making a motion to suppress which need not even have been reiterated at the trial, *Cogen* v. *United States,* 278 U.S. 221, 223 and was sufficient to preserve the point unless expressly waived as in *Lawn* v. *United States,* 355 U.S. 339, 353-54. Cf. *Johnson* v. *Zerbst,* 304 U.S. 458, 464. If the Government's contention were accepted a defendant could be convicted on illegally obtained evidence unless the entire circumstances of the search are known to the defense at the time of the motion to suppress. Moreover, even if a defendant could be bound by the assumptions of his motion to suppress where there was prejudice to the Government, none can be shown here. The actual circumstances constituted a far more serious violation of petitioner's Fourth Amendment rights than he had assumed, since under *Preston* the additional week's delay after arrest aggravated the illegality of the search. Finally, while we believe that disposition of constitutional issues in criminal cases should not be based on the misstep of one party or the other in the course of the proceedings, it is noteworthy that the present technical objection was not raised by the Government in the Court of Appeals, which decided the legality of the search on the merits.

The Government's alternative technical argument is that the admission of the marked money in evidence

was not prejudicial. The test enunciated by this court for determining whether the admission of the illegally seized evidence is harmless error is whether there is "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87. In this case there is not only a reasonable possibility, there is a substantial likelihood that the admission of the marked money aided in the petitioner's conviction. The Government's theory, though not spelled out, appears to be that since the jury acquitted petitioner on the sale count, it could not have treated the marked money as evidence against him. That argument fails first, because it is inaccurate in its factual premise: the jury did not acquit petitioner on the sale count but rather was unable to reach a unanimous verdict.[5] Thus, for aught that is known some members of the jury were influenced by this money to believe that petitioner had made the sale with which he was charged. Those jurors therefore would have been more likely to disbelieve his denial of both the sale and the possession and therefore have been more prone to convict him on the possession. Additionally, the marked money tended to corroborate the testimony of the government informant Hazel Geary whose credibility was critical to the government's case, and who was not inherently trustworthy. See Pet. p. 5, n. 2. This possibility was held

[5] Even if petitioner had been acquitted on the sale count, the Government's theory would rest on the assumption that the jury's actions on the two counts were consistent. This hypothesis, as the Government regularly and successfully has insisted, is unsound, and speculation over the reasons for a jury's actions on separate counts is impermissible. See, e.g. *Dunn* v. *United States*, 284 U.S. 390; *United States* v. *Dotterweich*, 320 U.S. 277, 279; *Hannon* v. *United States*, 340 F. 2d 145, 150 (CA9) cert. denied, 380 U.S. 977; *Koolish* v. *United States*, 340 F. 2d 513, 525-26 (CA8) cert. denied, 381 U.S. 951.

PETITIONER'S REPLY BRIEF

in *Stoner* v. *California,* 376 U.S. 483, 490 n. 8 to render the admission of illegally seized evidence reversible error. See also *Channel* v. *United States,* 285 F. 2d 217, 222 (CA 9).

II. The Glass Bottle Was Inadmissible

In seeking to sustain the admissibility of the glass bottle the government does not even attempt to discuss the controlling precedent, *Stoner* v. *California,* 376 U.S. 483. That case, we reiterate, unanimously held that a person may lose his constitutional protection against an unreasonable search only by his own consent or that of his agent. Neither court below found, and the government does not contend, that Miss Wright was acting as petitioner's agent when she consented to the search of the apartment at which he was a guest.[6] The claim that petitioner may object to the search only if his right to the premises is *exclusive* (Opp. p. 7) is contrary not only to *Jones* v. *U.S.,* 362 U.S. 257 but also to *Stoner* and the hotel cases which preceded it. Indeed, in both *Stoner* and *U.S.* v. *Jeffers,* 342 U.S. 48, 51 the Court expressly recognized that persons other than the occupant (whose right to be free from a warrantless search was sustained) will have access to a hotel room.[7] Thus, without more, *Stoner* requires reversal.

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[6] The Government's own statement of the facts demonstrates that Miss Wright was intent upon exonerating herself (Opp. p. 5), thereby negating any agency relationship.

[7] The two Court of Appeals decisions which are cited in the Opposition (p. 6) antedate *Stoner* and are therefore not authoritative. The results of those cases, however, may be sound, and can be reached by applying the *Stoner* analysis. Thus, in *Sferas,* one partner to the counterfeiting enterprise could be treated as the agent of the other partner with respect to a search of the business premises; likewise in *Stein* the wife could be considered the agent of her husband with respect to a search of their common domicile.

The Petition asserted that even if the search of the apartment had been justified by Miss Wright's consent, the seizure of the glass bottle was not justified since there was no claim that she consented to that action. Thus, the seizure was illegal unless "petitioner had *no* interest in the bottle". (Pet. p. 16, emphasis supplied). The government's sole attempt to rebut our position is to misstate it and to treat it as an argument on relevancy. (Opp. p. 7).[8] The tactic of erecting a strawman and combatting it implicitly concedes the merit of the contention actually raised.

With respect to the issue of voluntariness the Petition made two points:

(1) The Court of Appeals did not adequately review the District Court's determination of voluntariness because it affirmed that determination on the sole ground that it was not "clearly erroneous" (question 2(b) of the Petition); (2) the consent given under arrest was not voluntary (question 2(c) of the Petition). The Memorandum in Opposition, however, treats the petition as if it challenged the Court of Appeals' affirmance of the District Court's finding that Miss Wright had in fact consented (pp. 7-8). However, the Petition conceded that the consent was given, challenging only its voluntariness. That issue did not turn on Miss Wright's credibility, but is a mixed question of fact and law with constitutional overtones as to which the "clearly erroneous" test is plainly inappropriate. See *Baumgartner* v. *United States,* 322 U.S.

[8] The Petition said (pp. 16-17) that the bottle would be irrelevant if petitioner had *no* interest in it. This is transmuted (Opp. p. 7) into its converse—a claim that it "could not have been relevant evidence unless it was shown to have been his *exclusive* property".

665.[9] This proposition was acknowledged by the government in its brief in opposition in *Ziemer* v. *United States,* cited at p. 18, n. 13 of the Petition. Only by treating the Petition as having raised a different question could the Government avoid conceding error on this issue.

The only point which the Opposition makes which is even arguably meritorious is that *United States* v. *Mitchell,* 322 U.S. 65 held that a consent to a search given under arrest can be considered voluntary to justify a search without a warrant. (Opp. p. 7) This is a possible reading of the *Mitchell* case but we do not think it is a correct one. The central issue in *Mitchell* was whether the detention of the defendant was lawful under *McNabb* v. *United States,* 318 U.S. 332. The legality of his conviction and of the search were deemed to turn on that issue. The Fourth Amendment was not discussed. Nor did respondent argue that a consent to a search incident to an arrest was necessarily involuntary.[10] Thus the question appears to be open here. In any event some Courts of Appeals have been most reluctant to assume that a consent given under arrest is voluntary. In recognition of the psychological reality of the moral coercion inherent in

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[9] "Standards of this kind must be maintained and enforced by the trial and appellate courts. If they are not, the guarantees of the Bill of Rights can quickly disappear through nullification." *Judd* v. *United States,* 190 F. 2d 649, 652 (CADC).

[10] In *Mitchell* the consent was not to a generalized search, but to the seizure of particular stolen goods whose location was identified by the respondent. Arguably a different test would be applicable for the legality of the recovery of stolen goods. Cf. *Boyd* v. *United States,* 116 U.S. 616, 623; *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, 699-700.

police detention they have placed on the government the burden of establishing voluntariness.[11] Not so the court below. This contrariety of views on a recurring question should be resolved by the promulgation of the general standard by this Court.

CONCLUSION

The Petition for Certiorari does not emphasize the general importance of this case. It was thought enough that petitioner has been sentenced to five years imprisonment on a conviction which rests on the admission of two exhibits which were the products of separate illegal searches. We adhere to the view that certiorari should be granted because the decision below is inconsistent with *Preston* v. *United States, supra,* and *Stoner* v. *California, supra.* But if we are wrong in this, the issues raised by the Petition are of such significance to the administration of criminal justice that they merit this Court's attention.

The Government, while seeking to retain this conviction, does not dispute the importance of these questions; we submit that law enforcement officials would be well served by their resolution. Federal officers apparently conduct as a regular practice warrantless searches of automobiles believed to have been used in carrying narcotics; they should learn whether or not 49 U.S.C. § 782 justifies such action. Likewise they should know when they may rely on a consent to a search. The Government itself has asserted that the latter issue "will affect nation-wide law enforcement." See Pet. p. 17, quoting from the Government's Peti-

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[11] *Ray* v. *United States,* 84 F. 2d 654, 656 (CA5); *Judd* v. *United States,* 190 F. 2d 649, 651 (CA DC); *United States* v. *Arrington,* 215 F. 2d 630, 637 (CA7).

tion for Rehearing after the original decision below. There are many cases in which police officers could obtain a warrant but believe in good faith that none is necessary, thus needlessly risking the validity of the search and a subsequent conviction.

The Petition for Certiorari should be granted.

Respectfully submitted,

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